# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]

[redacted] 212

[redacted]

ALASKA PACIFIC FISHERIES, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

[redacted]

(26,010)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1917.**

## No. 543.

ALASKA PACIFIC FISHERIES, APPELLANT,

*vs.*

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.


| | Page |
|---|---|
| Caption | *a* |
| Transcript of record from the district court of the United States for the district of Alaska | 1 |
| Names and addresses of counsel | 1 |
| Complaint | 2 |
| Exhibit "A"—Proclamation by President of United States of America | 11 |
| Answer | 15 |
| Reply | 32 |
| Memorandum opinion, Jennings, J. | 36 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 18, 1917.

Page

Bill of exceptions ..... 50
Affidavit of Walter J. Elliott *et al* ..... 52
P. E. Harris ..... 54
Harry F. Geil ..... 56
Edmund Verney ..... 57
D. Noll, June 1, 1916 ..... 59
D. Noll, May 31, 1916 ..... 62
Charles D. Jones ..... 64
D. Noll, June 12, 1916 ..... 66
Letter, Hanford to Noll, May 17, 1916 ..... 67
Affidavit of Ernest P. Walker ..... 69
Affidavit of John J. Reagan ..... 72
Letter, May 13, 1916, Acting Secretary of War to Secretary of the Interior ..... 75
Affidavit of John J. Reagan, June 15, 1916 ..... 77
Blank form of affidavit referred to in affidavit of John J. Reagan ..... 79
Testimony of Charles A. Burckhardt ..... 81
Testimony of F. O. Burckhardt ..... 135
Affidavit of Joe Jenkins ..... 152
Ettie Copeland ..... 153
John J. Reagan, June 15, 1916 ..... 155
Charles Brindible ..... 156
John J. Reagan, September 29, 1916 ..... 158
Testimony of John J. Reagan ..... 161
Testimony of C. H. Hanford ..... 170
Exhibit 1 (to affidavit of Walker)—Map of Revillagigedo Channel ..... 176
Exhibit 2 (to affidavit of Walker)—Diagram ..... 177
Defendant's Exhibit 1—Chart of Clarence Strait, &c ..... 178
Defendant's Exhibit 2—Map showing fish-trap location, Cedar Point, Annette Island ..... 181
Stenographer's certificate ..... 182
Defendant's proposed findings of fact ..... 182
Findings of fact ..... 187
Defendant's proposed conclusions of law ..... 191
Conclusion of law ..... 194
Order settling bill of exceptions ..... 195
Injunction and final decree ..... 196
Petition for appeal ..... 199
Application for supersedeas ..... 202
Assignment of errors ..... 204
Injunction and final decree ..... 212
Order allowing appeal, &c ..... 214
Bond on appeal ..... 216
Citation and service ..... 218
Præcipe for record ..... 220
Clerk's certificate ..... 221
Order of submission ..... 225
Order filing opinion and recording judgment, &c ..... 226
Opinion, Morrow, J ..... 227
Decree ..... 249

Page

Order denying petition for rehearing and staying mandate ..... 251
Notice and petition for appeal ..... 252
Assignment of errors, &c ..... 253
Affidavit of amount in controversy ..... 260
Order allowing appeal, &c ..... 261
Bond on appeal ..... 263
Præcipe for record ..... 265
Clerk's certificate ..... 267
Citation and service ..... 269

No. 2828

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

# Transcript of Record.

**Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.**

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

*In the District Court for the District of Alaska, Division Number One, at Juneau.*

263—K. A.

No. 1468—A.

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through, or Under It or in Privity with It,

Defendant and Appellant.

**Names and Addresses of Attorneys of Record.**

HELLENTHAL & HELLENTHAL, Juneau, Alaska,

C. H. HANFORD, 355 Colman Bldg., Seattle, Washington,

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Counsel for Appellee.

*In the District Court for the District of Alaska, Division Number One, at Ketchikan.*

263—K. A.

No. 1468—A.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through, or Under It or in Privity with It,
Defendants.

**Complaint.**

Comes now the United States of America, and brings this Bill of Complaint against the Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, and complaining against the said defendants alleges:

I.

That the plaintiff, by virtue of its sovereignty, is the owner and seized in fee of the body of land known as Annette Island, situated in the Alexander Archipelago, in Southeastern Alaska, on the north side of Dixon's entrance, all situate within the First Division of the District of Alaska and within the jurisdiction of this court, and of the waters adjacent thereto.

II.

That prior to March 3, 1891, said island was occupied by an association of Indians known as the Matlakatlans or Metlakatlan Indians, and on said date the President approved an Act of the Congress of the United States, setting aside and apart as a reservation for the use of said Indians and such other Alaska natives as might join them said Annette Island and the islands adjacent thereto, which said Act is an Act entitled "An Act to repeal timber culture laws, and for other purposes," approved March 3, 1891, and Section 15 thereof provides as follows:

> "Sec. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago, in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakatla Indians, and those people known as Metlakatlans who recently emigrated [1*] from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

III.

That by virtue of said Act of Congress, the said Annette Islands and the whole thereof, the uplands together with the shore lands, became and at all times

*Page-number appearing at foot of page of original certified Record.

since the date of said Act have been and now are reserved to the exclusive use and benefit and occupancy of the Indians mentioned in said act, with the exclusive right to the use of the shore or tide-lands at all places on said islands to deep water free from obstructions or structures erected or maintained by others, and to the right of fishery in the waters surrounding said islands exclusively.

IV.

That ever since the passage of said Act of Congress, the Indians mentioned in said Act have been in the sole, exclusive, quiet and peaceable possession of said islands and the waters surrounding the same and adjacent thereto; that they have improved said lands, built a town thereon known as the village of Metlakatla, built and maintained a school, built and maintained a water system, built and maintained a fish cannery, sawmill, have governed themselves and by ordinances provided for fire protection and health protection, and have been in exclusive possession of the fisheries in the waters surrounding said islands; and in addition thereto have erected and maintained one of the largest churches in the Territory of Alaska.

V.

That in the year 1914, by ordinance of the Council of said Annette Islands, existing under the regulations of the Secretary of the Interior as provided by said Act of Congress, and with the approval of said Secretary, permits were granted to natives among the class mentioned in said Act of Congress to drive

and maintain fishing-traps in the waters surrounding said Island, and like permits were granted to such natives in the year 1915, and at no time since the passage and [2] approval of said Act of Congress has there been any interference by any person not mentioned in said Act of Congress with the possession and rights as aforesaid of the persons mentioned in said act until as herein alleged.

VI.

That in the year 1916, and prior to the commencement of this action, and, to wit, on April 28th, 1916, the President of the United States issued his proclamation defining the water boundaries of said reservation, and further reserving the fisheries thereof, and warning all unauthorized persons not to fish in or use any of the waters described therein; that the waters mentioned in said proclamation belong to the United States, and are within the jurisdiction of this court, and are part of the reservation by said proclamation and theretofore by said Act of Congress made for the use of the persons mentioned in said Act of Congress. A copy of said proclamation is hereto attached and made a part hereof and is marked Exhibit "A."

VII.

That all of the waters mentioned herein are navigable waters of the United States, and under the provisions of the Act of Congress of March 3, 1899 (approved on March 3, 1899), entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and

harbors and for other purposes," it was made unlawful for any person to create any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States, or to build or commence to build any structure in any waters of the United States except within established harbor lines, unless authorized by the Secretary of War prior to the beginning of the same, and upon plans submitted to and approved by the Chief of Engineers and the said Secretary, and that no harbor lines have ever been established in any of the waters of, surrounding or adjacent to said Annette Islands.

VIII.

That in the year 1916, prior to the commencement of this action the defendant Alaska Pacific Fisheries, a corporation, without right or title or color of same, and unlawfully, and with full knowledge [3] of all and singular the matters and things hereinbefore set out, and with knowledge of the intention of the President of the United States to issue the proclamation set forth herein, trespassed and entered upon the lands herein described, to wit, on the westerly shore and shore-land of said Annette Island, and drove a fish-trap from the shore of said island over the tide-lands and out into the deeper waters adjacent to said island and within the three thousand feet reserved in said proclamation, and in defiance of the law as herein set forth, and of said proclamation, and of notice personally served upon it and posted upon said premises, have maintained and are

maintaining and fishing said trap upon said shore-lands and the said reserved adjacent waters, and threaten to continue the same unlawfully and defiantly as aforesaid.

IX.

That on, to wit, May 2, 1916, notice was duly served by posting and personal delivery to said defendant of said reservations and said defendant was notified to cease driving or attempting to drive traps in said reserved lands and waters and to cease fishing therein.

X.

That other corporations, companies and persons have threatened to commit like trespasses upon said reservation, encouraged thereto by the action of the defendant herein, and threaten that they will commence the constructions of similar structures and commit other and further trespasses upon said property.

XI.

That the plaintiff has been for over a quarter of a century engaged by the means herein set forth and otherwise in caring for, educating and civilizing the Indians mentioned in said Act of Congress, and said Indians are now in the main educated and have adopted the habits and customs of civilized peoples, and the effect of the encroachments set forth herein upon the said reservation is greatly demoralizing and tends to destroy the effect of the plaintiffs [4] twenty-five years' endeavor for the uplift and civilization of said Indians and its efforts to make them

self-supporting and self-governing, and will thereby cause the plaintiff and said Indians irreparable injury, and there is no plain, sufficient, speedy or adequate remedy at law in the premises; that under the provisions of said Act of March 3, 1899, plaintiff is entitled to a mandatory injunction commanding said defendants to remove said structure from said water, and plaintiff is also entitled to an injunctional order from this Court requiring said defendants to desist from further construction, operation or maintenance of said structures *pendente lite.*

XII.

That the persons mentioned in said Act of Congress, to wit, said Indians, have at all times since the approval of said Act fished in the waters described in said proclamation, and that during a season lasting about three months and commencing about the middle of the month of May each year large quantities of salmon and other fish travel in the waters aforesaid; that the defendant's said fishing-trap is the most perfect fishing device in class known and catches immense quantities of fish daily during the said fishing season, and each day's operation thereof causes irreparable injury to plaintiff and said Indians, for the reasons herein set forth, and encourages other persons, firms, companies and corporations to commit similar trespasses.

XIII.

That there are ample fishing grounds, and sites and locations for traps in Southeastern Alaska, other than the limited area reserved for the purposes mentioned herein, and defendant has heretofore made

use of them and plaintiff is informed and believes is still so doing; and to permit defendant or others in like situation to maintain or operate traps in the said reserve will tend to destroy the confidence of said natives in the Government of the United States and its promises and endeavors in their behalf, and will result in irreparable injury to them and to plaintiff.

[5]

WHEREFORE, plaintiff prays the Court in the premises,—

For an injunction *pendente lite* directed to said defendants and those acting with, for or under them or in privity with them, at once enjoining and restraining them from continuing the construction of the trap mentioned in this complaint, or from fishing the same, or interfering in any way whatsoever with the free and uninterrupted passage of fish in and through the waters described in said proclamation, or from in any way trespassing upon the lands described in said Act of Congress or the waters adjacent thereto or upon the littoral rights of the said natives.

For a mandatory injunctional order compelling said defendants to vacate said lands and waters and to remove therefrom, and to remove said structures therefrom, and for an order to show cause why said last-mentioned order should not issue, if any they can, returnable at such time as the Court may fix.

That unless within five days from the entry of the order of this Court requiring said defendants to remove said structures and obstructions and vacate said premises, the defendants remove said structures and

obstructions in and upon the lands and waters of the United States, the same may be removed by the order of this Court directed to the marshal of this division, and the necessary costs and expenses of such removal be recovered against the said defendants and judgment therefor be awarded this plaintiff in the final decree of the Court herein.

For costs hereof and for such other and further and additional relief as the needs of the case may demand.

JNO. J. REAGAN,
Asst. U. S. Atty.,
Atty. for Pltff. [6]

United States of America,
District of Alaska, Ketchikan,—ss.

Jno. J. Reagan, being duly sworn, deposes and says: That he is Assistant United States Attorney for the First Division of the District of Alaska, and appears in this action by direction and authority of the Attorney General of the United States; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

JNO. J. REAGAN.

Subscribed and sworn to before me this 31st day of May, 1916.

[Court Seal] C. Z. DENNY,
Deputy Clerk of District Court, District of Alaska,
Division No. 1. [7]

**Exhibit "A" to Complaint—Proclamation by President of United States of America.**

By the President of the United States of America.

A PROCLAMATION.

Whereas it is provided by section fifteen, of the act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An Act to Repeal Timber-Culture Laws, and For Other Purposes," that "Until otherwise provided by law, the body of lands known as Annette Islands, situated in the Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's Entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtlan Indians, and those people known as the Metlakahtlans, who have recently emigrated from British Columbia, and such other Alaskan natives as may join them, to be held and used by them in common under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior," and

Whereas the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

Whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery;

Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power

in me vested by the laws of the United States of America, do hereby make known and proclaim that the waters within three thousand feet from the shore at mean low tide of Annette Island, Ham Island, Lowis Island, Spire Island, Hemlock Island, and the adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of the said islands, rocks and islets are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them [8] in residence on these islands to be used by them under the fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 28 day of April in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and fortieth.

Filed in the District Court, District of Alaska, First Division. Jun. 1, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: In the District Court of the United States for the 1st Div. of Alaska. United States of America vs. Alaska Pacific Fisheries, etc., et al. Complaint. [9]

*In the District Court for the Territory of Alaska, Division Number One, at Ketchikan.*

No. 1468—A.

No. 263—K. A.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES,

Defendant.

**Answer.**

Comes now the defendants and for Answer to the Complaint of the plaintiff herein admit, deny and allege as follows:

I.

Referring to the allegations contained in paragraph I of the Complaint, the defendants admit the same.

II.

Referring to the allegations contained in paragraph II of the Complaint, the defendants admit the same, only in so far as the same relates to the single island named, Annette Island, denying that any other islands are included in said proclamation.

III.

Referring to the allegations of paragraph III, the defendants admit that subsequent to the passage of the Act of Congress referred to in paragraph II in the Complaint, Annette Island has been occupied by the Metlakatla Indians or Metlakatlans

MISNUMBERED

referred to in the Act; but the defendants deny that the shore-lands or any part of said shore-lands, that is to say, the tide-lands lying between low water and the ordinary line of high tide, have been reserved by virtue of said Act of Congress or have been occupied by said Indians either in whole or in part, [11] and the defendants deny that the right of fishing in the waters surrounding said Island was by virtue of said Act of Congress or otherwise reserved to the use of the said Metlakatlans or others referred to in said Act or at all.

The defendants deny that the said Indians, Metlakatlans or others referred to in said Act or any other person or persons whatsoever have had by reason of said Act or otherwise the exclusive right to use, occupy or control the tide-lands lying between low-water mark and the line of ordinary high tide along the shore of Annette Island or any part of said tide-lands.

IV.

Referring to the allegations of paragraph IV of the Complaint, the defendants deny that ever since the passage of the Act of Congress therein referred to or at all, or at any time whatsoever, the Indians mentioned in said Act or any other person or persons whatsoever have been in the sole or exclusive or quiet or peaceable possession, or have been in any wise possessed of the waters surrounding said Island and adjacent thereto or any part or portion of said waters whatsoever.

The defendants admit that the Indians referred to in said Act have occupied Annette Island and

they have built thereon a village known as Metlakatla containing a school, water system, fish cannery, sawmill, and the defendants further admit that in a limited sense said Indians have governed themselves. This admission, however, is made subject to the following qualification: That while the fish cannery and other improvements mentioned were built by the Indians referred to, all such work of construction was done under the personal supervision of one Father Duncan, a white man, and the operation of [12] the cannery and sawmill mentioned was at all times under the personal supervision of the said Father Duncan, who, as herein elsewhere stated, was at all times at the head of said Indian colony until deposed by the plaintiff, and in this connection it is further averred that neither said cannery nor sawmill have been operated since the time that said Father Duncan was so deposed.

V.

Referring to the allegations of paragraph V of the Complaint, the defendants aver that they have not knowledge or information in relation to the matters and things therein set forth sufficient to enable them to form a belief and they therefore deny the same.

VI.

Referring to paragraph *six* VI of the Complaint, the defendants admit that on the 28th day of April, 1916, the President of the United States issued a proclamation as in said paragraph referred to, but in this connection aver that said proclamation so issued was issued without authority of law and is void

and of no effect. In this connection defendants aver that said proclamation of the President was made without authority and in violation of the provisions of the Constitution of the United States, the matters referred to and sought to be affected by said proclamation being entirely within the jurisdiction of Congress, under the provisions of the Constitution.

VII.

Referring to the allegations of paragraph VII of the Complaint, the defendants deny each and every allegation in said paragraph contained, except that the waters therein referred to are navigable waters of the United States, and that no harbor lines have ever been established in any of the waters surrounding or adjacent to Annette Island. **[13]**

VIII.

Referring to paragraph VIII of the plaintiff's complaint, the defendants aver that the Alaska Pacific Fisheries constructed a fish-trap in the navigable waters on the westerly side of Annette Island, but deny the said fish-trap was constructed without right or without title or color of title, or that the same was constructed unlawfully, and further deny that said fish-trap was constructed with full knowledge or with any knowledge whatsoever of the fact that the President of the United States intended to issue the proclamation referred to in the complaint and hereinbefore referred to, or with any knowledge of any of the matters or things referred to as set out in the complaint, except such

matters and things as have been hereinbefore expressly admitted.

And the defendants further deny that they trespassed upon the westerly shore or any part of Annette Island or committed any act of trespass whatsoever, and deny that they entered upon the shore-land of said Island or upon said Island at all either for the purpose of driving a fish-trap or otherwise; deny that they entered upon the tide-lands lying in front of said Island in this connection or at all, but admit that the fish-trap constructed by them is situate within three thousand feet from the shore of said Island, denying, however, that the same is within any reserve created or existing, admitting that the same is within the area sought to be reserved by the proclamation of the President hereinbefore and in the Complaint referred to, averring that said proclamation was issued without authority of law and is void and of no effect.

Defendants further deny that said fish-trap was constructed in defiance of law or in defiance of said proclamation [14] made by the President, and aver in this connection that the construction of said fish-trap commenced on the 7th day of April, 1916, and was completed on the 18th day of April, 1916; that no knowledge, notice or information ever reached the said Alaska Pacific Fisheries, or any of these defendants, that the President of the United States intended to issue any such proclamation as is herein referred to and as is referred to in the Complaint until after said fish-trap was fully completed, and that the notice served as referred to in

paragraph VIII was served upon the defendants and the said Alaska Pacific Fisheries after the completion of said fish-trap.

The defendants in this connection further aver that while it is their intention to operate said fish-trap for the purpose of catching fish to supply their canneries as hereinafter more specifically set forth, said acts of said defendants in so operating the same are neither unlawful nor defiant, but are within the rights of said defendants and the said Alaska Pacific Fisheries as citizens of the United States as hereinafter more expressly referred to.

IX.

Referring to the allegations of paragraph IX, the defendants admit that they were on the 4th day of May, 1916, served with a notice as in said paragraph set forth.

X.

Referring to the allegations of paragraph X of the Complaint, the defendants aver that they have not knowledge or information concerning the matters and things therein set forth [15] or any of them sufficient to form a belief, and therefore the defendants deny each and every allegation contained in said paragraph X and the whole thereof.

XI.

Referring to the allegations in paragraph XI of the Complaint, the defendants deny that the plaintiff has been for a period of a quarter of a century, or at all, engaged by the means set forth in the complaint or otherwise or at all in caring for, educating or civilizing the Indians mentioned in the Act of

Congress, or that the plaintiff has in any wise assisted said Indians or rendered them any service whatsoever, except that Annette Island was by Act of Congress reserved for their use as hereinbefore set forth.

The defendants admit that the Indians have been to some extent during the past twenty-five years educated, and they have to some extent adopted the habits and customs of civilized people, but deny that this is due either in whole or in part to any efforts on the part of the plaintiff.

The defendants deny that the Indians mentioned have been injuriously affected by any of the matters and things referred to in the Complaint or that any encroachments upon their rights on the part of the Alaska Pacific Fisheries or any of the defendants herein has been demoralizing or has tended to destroy the effect of the plaintiff's endeavors during twenty-five years or at all for the uplifting and civilization of said Indians, or the endeavors of anyone else other than the plaintiff in behalf of these matters either in the way of making said Indians self-supporting, self-governing or otherwise, or that any of the matters or things referred to in the Complaint will cause the plaintiff or said Indians irreparable injury or any injury whatsoever, and defendants further deny that that there is no plain, speedy remedy at law, and denying that the plaintiff is entitled under the provisions of the Act of March 3, 1899, or under the provisions of any other act [16] or law whatsoever to a mandatory in-

junction commanding the defendants to remove structures from the waters referred to or to any other relief whatsoever, or that the plaintiff is entitled to an injunction to be issued out of this court requiring the defendants to desist from further constructing, operating or maintaining the structures referred to during the pendency of this action or to any other relief in this connection whatsoever. And in connection with the matters and things referred to in said paragraph XI, the defendants aver:

That prior to the time the Act of Congress referred to in the Complaint and hereinbefore referred to, setting aside Annette Island as a reservation was passed, one Father Duncan, a man of benevolent and altruistic tendencies, had proceeded to British Columbia with a view of civilizing and uplifting the native tribes resident in that locality; that he, at the head of a colony, migrated from said British Columbia to Annette Island, taking with him from said British Columbia the Metlakatla Indians or Metlakatlans referred to in the Act of Congress creating said reservation; that all of the Indians so migrated from British Columbia to Annette Island were citizens, residents and inhabitants of British Columbia prior to the said migration and came to Annette Island as members of a colony headed by the said Father Duncan.

That prior to the passage of the act creating the [17] reservation referred to, a party composed of United States Senators and other influential men visited said colony and at the request of said Father Duncan introduced in Congress the measure creat-

ing the Annette Island Reservation for the use and benefit of said colony of Indians; that said Father Duncan, without any assistance from the plaintiff whatsoever, established a church, a school, a cannery, a sawmill and the other improvements referred to in the Complaint on said reservation, employing in that connection the Indians residing upon the reservation; that through the efforts of said Father Duncan and through his efforts alone said Indians were educated and civilized and taught the habits, trades and customs of civilized people.

That while the said Father Duncan was so active in the uplifting and civilization of said Indians, the plaintiff, acting through one of its bureaus, deposed said Father Duncan as leader of said colony and placed the same, together with all the structures and improvements placed thereon at the direction of Father Duncan, under the control of the Bureau of Education; that said action of the Bureau of Education was resisted by said Father Duncan, but notwithstanding such resistance, said Bureau of Education assumed control of all the property situate on Annette Island and deposed said Father Duncan from the leadership of said colony, which action on the part of the Bureau of Education resulted in the demoralization of the colony and the undoing of much of the benevolent work theretofore performed by the said Father Duncan.

That the said Father Duncan was so deposed and the [18] property referred to was so seized by the said Department of Education in the year ——, and that since said last-mentioned date the cannery

and sawmill situate on said Island, which had been theretofore profitably operated by said Father Duncan have remained idle, and the good work, both in connection with the civilization of the Indian tribes and in the attempt to make such tribe self-supporting, was by said indiscreet action of the Bureau of Education largely undone.

XII.

The defendants admit that the Indians mentioned in the Act of Congress have since the approval of said Act to some extent fished in the waters described in the proclamation of the President hereinbefore referred to, and the defendants admit that during each fishing season large quantities of salmon and other fish travel in said waters.

The defendants further admit that the defendants' fishing-trap constructed as hereinafter more specifically set forth is the most perfect fishing device known, and is such as to catch large quantities of fish daily during the fishing season, but denies that each day's operation thereof, or the operation thereof for any period of time whatsoever, will cause irreparable injury or any injury whatsoever to the plaintiff or to the said Indians or to anyone else, and deny that any of the matters and things set forth in the Complaint will encourage any person, persons, corporations, companies or firms or anyone whatsoever to commit any kind of trespass.

XIII.

Referring to the allegations of paragraph XIII, the [19] defendants deny that there are ample

fishing grounds or sites or locations for traps in Southeastern Alaska outside of the area embraced within the reserve of the President herein and in the Complaint referred to.

The defendants admit that they have heretofore caught fish in other localities and that they are still catching fish in other localities as hereinafter more specifically narrated, but deny that they are able to catch a sufficient supply of fish in localities other than the waters embraced within said so-called reserve of the President to supply their now existing canneries with fish for canning purposes.

The defendants deny that to permit the defendants or others in like situations to maintain or operate traps in the waters contained within said so-called reserve would tend to destroy the confidence of the natives in the government of the United States or to destroy the confidence of such natives in the promises and endeavors of such Government in their behalf, or that to do so would result in irreparable injury or any injury whatsoever to them or to the plaintiff.

And the defendants further answering aver:

I.

That the Alaska Pacific Fisheries is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, duly authorized to do business in the Territory of Alaska, under and by virtue of the laws thereof, having complied with all the requirements of the laws of said Territory relating to corporations, and that it is authorized [20] to engage in the business of fishing and can-

ning fish and to carry on and conduct other similar pursuits.

II.

That each and all of the stockholders of said Alaska Pacific Fisheries are citizens of the United States of America and that there have been no alien stockholders in said corporation at any time since its organization.

III.

That said corporation is the owner of three salmon canneries situate in Southeastern Alaska, one of these is situate at Chilkoot Inlet, many miles to the north of Annette Island, and this cannery is not dependent for its fish supply upon fish caught in any of the waters or localities hereinbefore referred to, the other two canneries are situate, one at Yes Bay and one at Chomly. The first named cannery of these last-mentioned canneries, that is to say, the cannery situate at Yes Bay is dependent to a considerable extent upon fish caught within the navigable waters of the United States situate within the area covered by the President's proclamation aforesaid, and the last mentioned, that is to say, the cannery situate at Chomly is dependent from ½ to ⅓ for its fish supply upon fish caught within the navigable waters of the United States embraced within said proclamation of the President.

IV.

That in the construction of said canneries the said Alaska Pacific Fisheries Company has expended many thousands of dollars, said canneries being in all respects modern and well equipped canneries;

the cannery at Yes Bay having a capacity of 100,000 cases and that at Chomly having a capacity of 110,000 cases; that in the winter and spring of [21] 1915 and 1916 the said Alaska Pacific Fisheries bought its supplies for and equipped its said canneries so that the same could be fully operated during the year 1916, and expended in that behalf a sum aggregating $500,000.

That for many years last past the said Alaska Pacific Fisheries has caught and purchased fish caught in the navigable waters of the United States so enclosed within the proclamation of the President for use in its said canneries, and relying upon its right to catch and take from such navigable waters the fish found therein has expended the sums aforesaid in the construction and equipment of its said canneries.

That in the spring of 1916, with a view of supplying its said canneries, more especially its said Chomly cannery, the capacity of which had been increased during the winter of 1915 and 1916, constructed a fish-trap in the navigable waters of the United States off the west shore of Annette Island, which said fish-trap was so constructed that the portion thereof nearest the shore was and is more than 600 feet distant from Annette Island, and a considerable distance below and to the seaward of low-water mark, and its seaward portion is distant approximately 2000 feet from the shore of said Annette Island; that said fish-trap so constructed is a well-known ordinary and usual device employed in

catching salmon in the navigable waters of the United States, and is so constructed that it does not interfere with navigation or in any wise obstructs the navigable channels or waters of the United States or prevents the free use thereof, but that to the contrary said trap so constructed and maintained is an actual aid to navigation and serves to take the place of aids to navigation which should be maintained by the plaintiff. [22]

V.

That said fish-trap was fully completed before any proclamation was issued by the President as stated in the Complaint or at all, and was built and completed without any knowledge of any intention on the part of the President to issue such proclamation, and that in its construction and maintenance said Alaska Pacific Fisheries acted lawfully and in the exercise of its right to catch food fish in the public fisheries, and further that said trap was constructed in full compliance with the laws of the United States and the Act of Congress relating to the construction and maintenance of fish-traps, is not situate across or above the tide-waters of any creeks, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red salmon stream or within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fish appliance.

And in this connection the defendants further aver that if the Alaska Pacific Fisheries is deprived of the use of said trap, it will be unable to supply its said canneries, more especially its said Chomly

Cannery, with sufficient fish to operate the same except to a very limited extent during the year 1916; that if so deprived to operate its said cannery to its full extent at Chomly a large extent of the moneys so expended in outfitting the cannery for the season's work of 1916 will be lost; that the loss in that behalf to the Alaska Pacific Fisheries if not allowed to operate said fish-trap during the year 1916 will aggregate at least fifty thousand ($50,000.00) dollars, all of which will be a total loss to the said Alaska Pacific Fisheries.

In this connection the defendants further aver that [23] the salmon cannery formerly constructed on Annette Island as hereinbefore set forth was destroyed by fire, and that there is not now any cannery on Annette Island in which salmon can be canned, and that because of the lateness of the season it is impossible to construct a cannery on said Island in time to can fish caught during the season of 1916.

That the Indians residing on Annette Island have always been employed by the said Alaska Pacific Fisheries in connection with its operations to the extent that all of such Indians seeking such employ have at all times been given employment; and that the said Alaska Pacific Fisheries have already during this season and still intend to employ such Indians in that connection.

That the issuance of an injunction *pendente lite* would not only work irreparable injury to the defendant, the Alaska Pacific Fisheries, in that it would cause a loss to it during the season of 1916 of

not less than fifty thousand ($50,000) dollars because of its failure to put up its salmon pack during that season if prevented from so supplying its cannery with fish, to say nothing of the loss to the plant and the original investment therein if such plant is deprived of its fish supply by the threatened action of the plaintiff, but, on the other hand, the Metlakatlans and Metkatla Indians will, if this injunction be issued, be deprived of employment because of their inability to catch fish in said trap and assist in the canning of the same, and suffer great injury in that behalf in view of the fact that no cannery exists on Annette Island in which such Indians can be employed or in connection with which such employment [24] can be obtained.

That in making the investments above referred to and making the expenditures of money herein related, the Alaska Pacific Fisheries relied not only upon its right to catch fish in the waters of the United States, but also upon the Acts of Congress regulating the fisheries and enacted in relation to such fisheries, and upon the good faith of the Government of the United States in the preservation and protection of its said rights.

WHEREFORE the defendants pray that the plaintiff's bill be dismissed and that the application for an injunction *pendente lite* be denied, and that the restraining order heretofore issued be dissolved.

JAMES A. SHOUP,
C. H. HANFORD,
HELLENTHAL & HELLENTHAL,
Attorneys for the Defendants.

United States of America,
Territory of Alaska,—ss.

Charles A. Burckhardt, being first duly sworn, on oath deposes and says: That he is the president of the Alaska Pacific Fisheries, defendant herein; that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true, and affiant makes this affidavit on behalf of the Alaska Pacific Fisheries.

CHARLES A. BURCKHARDT.

Subscribed and sworn to before me this 15th day of June, 1916.

[Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Nov. 30, 1917.

Due service by copy admitted this 15th day of June, 1916.

JNO. J. REAGAN.

Filed in the District Court, District of Alaska, First Division. June 15, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [25]

*In the District Court for the District of Alaska, Division No. One, at Ketchikan.*

No. 1468–A.

No. 263–K. A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

**Reply.**

The plaintiff, referring to the 8th paragraph of defendant's answer, denies that said trap was completed on the 18th day of April, 1916, and alleges that said trap was not completed until the latter end of May or the first of June, 1916; and denies all the affirmative matters set forth in paragraph 11 of said answer, excepting as follows: That said Indians migrated from British Columbia to Annette Islands and the plaintiff set aside said Islands as a reserve for said Metlakahtlans and permitted the said William Duncan, described in said answer as Father Duncan, to remain with them and aid in their education and training; and alleges that the plaintiff appropriated large sums of money, to wit over $15,000, to assist in the education and training, industrially and otherwise, of said Indians, and that said Duncan was entrusted with other sums of money by other persons for the same purpose and in

trust for the use of said Indians; and denies that any action of the plaintiff or any of its departments is responsible for the condition of affairs which plaintiff is struggling to overcome. As to defendant's further answer, plaintiff has no knowledge or information as to allegations thereof and therefore denies the same.

As to the allegations of 4th paragraph thereof, plaintiff has no knowledge or information, and therefore denies the same, except that it admits that defendant purchased fish from the natives caught within the reserve in this action set forth.

As to the allegation of the 5th paragraph thereof, plaintiff [26] denies said trap was fully completed before any proclamation was issued by the President as in this action stated, and denies that same was built and completed without any knowledge of the intention on the part of the President of the United States to issue such proclamation, and denies that it acted lawfully in the construction of said trap, and denies that said defendant will be unable to supply its canneries or any of them with sufficient fish to operate the same if prevented from fishing in the waters reserved by the said proclamation; and alleges that it can supply itself with fish as it has done heretofore by purchasing the same, so far as they are derived from the waters described herein, from the natives inhabiting said reserve; and denies that said defendant will be damaged in the sum of $50,000 or in any sum at all if prevented from fishing within said reserve; and further denies that

it is impossible to construct a cannery on said reserve in time to can fish during the season of 1916; and denies that that is a material fact in this suit; and denies that the issuance of an injunction will work an irreparable or any injury to the defendant or will cause it a loss of $50,000 or any sum whatever; and alleges that if there is any loss to the defendant for the driving and maintenance of said trap, it is due to the illegal act of the defendant itself and to no other cause; and denies the right of the defendant to allege any loss to the said Metlakahtlans; and alleges that said allegation is immaterial to any issue in this suit; and alleges that the same is not true. And further, plaintiff denies that said defendant relied upon any pretended right to catch fish in said reserve; and denies that said defendant acted in good faith in the driving and maintenance of said trap and its attempt to operate the same, and alleges that it has been the practice under the regulations of the Interior Department of the United States well known to the defendant to obtain permits from the Interior Department or the Annette Council acting under authority of said Interior Department for the construction of traps in the waters aforesaid, and that these traps are permitted and have been so permitted to be constructed only by inhabitants of [27] said reserve and under financial arrangement well known to the defendant, and the catch of said traps and of all fishing in said waters have been purchased by the defendant and others for the supply of their canneries, and the con-

struction of the trap mentioned herein is a detriment because of preventing the work of the natives in the fishing industry rather than a help to them.

WHEREFORE plaintiff prays as in said complaint it has heretofore prayed.

JNO. J. REAGAN,
Asst. U. S. Atty.

United States of America,
District of Alaska,
At Juneau,—ss.

Jno. J. Reagan, being duly sworn, deposes and says: That he is Assistant United States Attorney for the First Division of the District of Alaska, and appears in this action by the direction and authority of the Attorney General of the United States; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

JNO. J. REAGAN,

Subscribed and sworn to before me this 15th day of June, 1916.

[Notarial Seal] INA S. LIEBHARDT,
Notary Public.

My commission expires September 29, 1919.

Received a copy of above June 15, 1916.

HELLENTHAL & HELLENTHAL,

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [28]

*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 1468–A.

No. 263–K, A.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, its Officers, Agents, Employees, and all Persons Acting by, Through or Under It or in Privity with It,
Defendants.

**Memorandum Opinion.**

PRESIDENT'S PROCLAMATION.

Reserving Annette Island for Metlakahtla Indians, etc. **[29]**

On March 3, 1891, Congress passed an Act entitled "An Act to Repeal the Timber Culture Laws," the 15th Section of which Act reserves "that body of lands known as Annette Islands" for the use of Metlakahtla Indians and others therein named.

In April of 1916 the defendants, without permission of any kind, began, and at the date of the proclamation hereinafter mentioned had almost completed, a fish-trap situate in navigable waters within 2,000 feet of the shore of Annette Island. Defendants design to complete said trap and to have it ready for effective operation by the time of the commencement of the run of fish, to wit, about July

1st. On the 28th day of April, 1916, the President issued a proclamation reserving

> "the waters within three thousand feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island, and the adjacent rocks and islets * * * also the bays of the said islands, rocks and islets are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands."

The Government by this suit seeks an injunction to prevent the defendants from operating said trap and to compel the removal of said trap, basing its suit on the claim that the continuance of the trap at the *locus quo* is in defiance and violation of the terms of the Act and the proclamation, and is also in violation of section 10 of the Rivers and Harbors Act approved March 3, 1899.

Defendants contend that the Act itself does not reserve any water and that the proclamation is unauthorized so far as it attempts to reserve any part of the waters and so is null and void, and that the trap is not an obstruction to navigation and so does not come under the inhibition of the Rivers and Harbors Act aforesaid. [30]

Considering the Act and proclamation, the following is to be considered:

The Attorney General, having been asked for an opinion as to whether or not the President could lawfully set apart a body of public domain for the

use of alien-born Indians, on February 28, 1887, gave it as his opinion that the power of the President "to declare *permanent* reservations for Indians to the exclusion of others on the public domain does not extend to Indians not born or resident in the U. S.," and that it would require an Act of Congress to make the reservation aforesaid:

Notwithstanding that no Act in the premises was in force (but probably in contemplation of the passage of such an act), a tribe or body of Indians known as Metlakahtlans did emigrate from British Columbia and settle upon Annette Islands. There they built and occupied houses, constructed and furnished in the way of the white man, erected churches and schools, planted small gardens, established a rude form of local self-government, and generally attained a state of civilization far superior to that of most natives and of some white men. The principles of humanity naturally dictated that these people should be encouraged in the exercise and development of the intelligence, thrift and industry of which they had given abundant evidence; and too, manifestly it was highly desirable that native Alaska Indians should, if possible, be induced to join them. So on March 3, 1891, Congress inserted the following provision in the Act approved March 3, 1891, entitled "An Act to repeal the Timber Culture Laws" (26 Stats. L. 1101), to wit:

> "Sec. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in South-

eastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

In passing this Act, Congress must be held to have known (what everyone else knew) that the Indians of Alaska are fisher [31] folk and hunters and trappers and largely, if not entirely, depend for their livelihood upon the yield of such vocations—it must be held to have known that without the food yield of the sea these Indians could not survive, for the Annette Islands would not of themselves "as land" afford a subsistence for a community of souls —there being little or no agricultural land on the Islands, or for that matter in all Southeastern Alaska. Not only is the Act an encouragement to remain extended to those Metlakahtlans "who had recently emigrated," but it is also an invitation to come held out to all Metlakahtlans and to such Alaska natives as may join them. The Act affords no promise that the privilege conferred is to be exercised in whatsoever manner the Indians may choose—on the contrary, the use granted is to be held and exercised "under such rules and regula-

tions as may be prescribed from *time to time* by the Secretary of the Interior." In other words, the "Great White Father" says to the Metlakahtlans and to "all other Alaskan natives who may join them," "You are welcome to come to these islands, to make your homes here, to make a livelihood here, to pursue such occupations as you may see fit. My Secretary will make some regulations and restrictions for your welfare, your happiness and your protection. You may use these islands subject only to such rules and regulations, and under such restrictions as he may make."

Good faith undoubtedly requires that the rules and regulations or restrictions spoken of are not to be taken as rules and regulations or restrictions binding only the Indians, but as rules, regulations and restrictions binding upon all other persons. This is necessary in order that the thing to be done may be effected according to the true intent, meaning and purpose of the donors, and in justice to the donee. The object to be accomplished is that these Indians may work out their destiny—that they may develop into good citizens, useful and happy,—not alone for their own sake but for the good of the country and in the interest of humanity and civilization. A reservation is [32] created for them—not the ordinary Indian reservation, within whose limits they are to be *confined,* but a reservation which shall be their home if they choose to make it their home—where the race may multiply and increase, and develop under the guiding hand of a high officer of the Government.

It has been suggested that when the Government grants the upland, the high-water mark is the boundary of the grant, and that in strictness these Indians are entitled to the exclusive use of only so much as is above high-water mark; but the privilege conferred bears no analogy to a grant of land—nothing is granted to these Indians except a privilege, and that, too, only "until otherwise provided by law." No title is parted with by the Government. To hold that the privilege extended means nothing more than that the Indians are to have the use of the upland only is to say that Congress is engaged in the business of luring the unsuspecting, of cheating and deceiving them. The language is not to be construed in the strict, narrow, legal sense which obtains between equals dealing at arm's-length, but in a broad and generous sense in which words are to be taken when one of superior power, knowledge and intelligence deals with an inferior—the language used must not be so interpreted "as to justify the charge that the Government has laid a trap" for these people.

To construe the invitation extended by the act with all the strictness of a legal conveyance of real estate would defeat the very object contemplated by the act.

Good faith also suggests that when Congress set apart "that body of lands known as the Annette Islands," it ought not to be held to mean only land—it must be held to mean "the lands" generally and the adjacent sea to a reasonable extent, in which alone were to be found that which made liv-

ing upon the land a possibility—a practicability. The very generality of the terms used, to wit, "the body of lands," "Annette Islands," would seem to indicate that Congress did not mean to dole out its generosity in inches, feet, or even acres, but that it meant to confer a useful, practicable, [33] benefit to the Indians by securing to them a useful and practicable home.

The "body of lands known as Annette Islands" should be taken to mean "that region" known as Annette Islands,—as if one should say that body of lands known as Alaska, or that body of lands known as the Philippine Islands or Porto Rico.

Congress meant to make an Indian reservation. Alaska, it is true, is not Indian country in the conventional sense of the word, and the aborigines of Alaska have never been compulsorily herded upon reservations, yet it is Indian country so far as Congress chooses to make it such (U. S. vs. Nelson, 29 Fed. 202), and "that body of lands known as Annette Islands" is an Indian reservation because Congress has chosen to make it such. From that day to the encroachment by the defendant complained of by the complaint the Indians and the public generally have treated the Act as one reserving the waters immediately contiguous to the high land of these islands as well as the high land itself.

It is in evidence from the date of the Act until the irruption of these defendants in 1916, a period of twenty-five years, no attempt has been made to encroach upon the use by the Indians of the islands or the waters adjacent thereto. (Verney's affi-

davit.) On the land they have built their houses, while the waters surrounding the islands have furnished them with a bountiful supply of fish. At first the only use for the fish caught was for immediate consumption or for smoking for use later by the tribe and those with whom they bartered, but with the development of the fish-canning industry in Alaska, a wider and more lucrative market for fish *spring* into existence. The Indians, under the directions of him who had brought them out of barbarism, established and for some time operated a salmon cannery. This not only supplied them with a very edible variety of food, but also furnished employment to many of the tribe, and other Indians.

Congress had the right to do as it pleased with these lands and waters. The people of the United States, succeeding to and **[34]** exercising the prerogative of the British Crown and the powers of Parliament, certainly have plenary power, through their representatives, over the lands and waters of the United States—to make reservations of land for public purposes—to grant exclusive rights of fishery, and even to close navigable waters.

(2 Farnham on Waters, sec. 370, p. 1373.)

The Congress, representing the people of the United States, has under the Constitution the power to dispose of and make all needful rules and regulations respecting the Territory of other property belonging to the United States.

(Constitution, Article IV, Section 3.)

Annette Island, and all islands, lands and waters in Alaska, were, on March 3, 1891, the property of

the United States. Congress made this Reservation for these Indians and has confirmed it in later legislation (6th proviso of Act of May 14, 1898, 30 Stats. L. 409; Compiled Laws of Alaska 1913, sec. 92), and has strikingly manifested its approval of the Metlakahtlans by the Act of March 4, 1907 (34 Stats. L. 1411; Alaska Compiled Laws 1913, sec. 24), allowing them to own motor boats and take out licenses as engineers and pilots and masters.

Some time in April of 1916 defendants went upon the waters within about 2,000 feet of the low-water mark of Annette Island and began the construction of a fish-trap, such as is commonly used by the cannery-men of Alaska whereby to secure a supply of salmon for canning. Such fish-traps are very effective for the purposes for which they are intended, and unless such contrivances are thoroughly regulated and supervised they will eventually completely exhaust the supply of fish. It appears from the evidence that the islands are very advantageously situated in this regard—they are comparatively near the open sea, and large quantities of salmon coming therefrom and making their way to their spawning grounds, pass within the three thousand foot limit fixed by the President's proclamation herein mentioned. It also appears that fish-trap sites are not only becoming **[35]** very scarce farther inshore, but also the nearer the open sea the fish are caught the better they are for canning purposes. (Burckhardt's testimony.)

The run of fish at Annette Island does not com-

mence until about July 1st of each year, and before the webbing or netting was put upon the trap in question the President issued the said proclamation. That proclamation in terms is more specific than the terms of the Act. The Act does not say anything in specific terms about "3,000 feet" of the shore of Annette Island, but the proclamation does.

The power of the President to withdraw land or water which the United States owns and over which it has exclusive jurisdiction and devote it to use for the public good can hardly be successfully denied. Such power has been exercised from the earliest times in the creation of Indian reserves and military and naval reserves and as sites for fortifications, etc. Indian reservations are reservations for the public purposes. (17 Opinions Atty. Gen. 260.)

> "An Indian reservation is part of the public domain set apart by the proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of Congress, by a treaty, or by an executive order."
>
> Wolcott vs. Des Moines, 5 Wall. 681.
>
> Grisar vs. McDowell, 6 Wall. 663.
>
> U. S. vs. Payne, 8 Fed. 888.
>
> 43 cases Brandy, 14 Fed. 539.

It is not unreasonable to construe the Act itself as a reservation not alone of the land but also of a reasonable extent of waters immediately adjacent thereto, which may be necessary to effect the objects and purposes of the Act interpreted in the light of circumstances and conditions. For the Ex-

ecutive so to construe it and to make rules and regulations and restrictions in accordance with such construction is not to usurp legislative functions—it is but to execute the law in its true scope and meaning.

By the Constitution (article 2, section 3) it is made his duty to "take care that the laws be faithfully executed"; Mr. Justice Miller has asked, "Is this duty limited to the enforcement **[36]** of the Acts of Congress according to their express terms, or does it include * * * all the protection implied by the nature of the government under the constitution?"

(In re Neagle, 135 U. S. 64—16.)

Presidential reservation of a portion of the sea, under an Act reserving in terms only "lands," finds precedent in the action of President Harrison, who by his proclamation of December 24, 1892, set apart "Afognak Island, Alaska, as a public reservation, including use for fish culture station, *and its adjacent bays and rocks and territorial waters,* including among others the Sea-lion Rocks and Sea Otter Island," and said proclamation contained an express warning to all persons "not to enter upon or occupy the tract or tracts of land *or waters* reserved by this proclamation, *or to fish in or use any of the waters herein described or mentioned,* and that all persons or corporations now occupying said island, or any of said premises, except under said treaty shall depart therefrom." (27 Stats. L. 1052; Compiled Laws of Alaska, 1913, page 174.)

It will be seen that this is a very extensive reservation of waters and a very drastic curtailment of the rights of both fishery and navigation, and yet the only Act of Congress on the subject which I have been able to find is contained in the 14th section of said Act of March 3, 1891, as follows:

> "That none of the provisions of the last two preceding sections shall be so construed as to warrant the sale of any 'lands' (note the word 'land'—R. W. J.) * * * which shall be selected by the United States Commissioner of Fish and Fisheries *on the island* (note the words 'on the island') of Kodiak *and Afognak* for the purpose of establishing fish culture stations."

This reservation has never been directly attacked, but in the case of Russian American Co. vs. U. S., 199 U. S., page 579, the Supreme Court say:

> "As the President exercised the rights thus reserved, and declared the whole island appropriated for the purpose of establishing a fish-culture station, and warned all persons to depart therefrom, it is clear that the rights, if any, previously acquired by the settlement were terminated by the proclamation."

So far as I have been able to ascertain, the action of President Harrison in making the [37] reservation include the water for a distance of 1,000 feet of the shore has never been characterized as "an attempt to govern America by proclamation."

I am forced to the opinion that the area marked

on the plat accompanying the proclamation of the President in evidence in the case at bar is lawfully reserved—that it is a reasonable reservation—a necessary one—for public purposes—"of territory or other property belonging to the United States," and that defendants are trespassers.

But it is said that even granting that the intent, meaning and scope of the reservation in the Act is broad enough to include the area within 3,000 feet of the low-water mark, or granting the validity of the President's proclamation, still the United States has no equity for an injunction because it has no pecuniary interest.

This suit is brought by the Government in its capacity as Sovereign as well as in its capacity as Lord Paramount of the Land and the Water. The sacred faith of the nation is pledged to these Indians—the latter are invitees of the Government—The obligation on the part of the Government to live up to its obligations is enough to give it standing in equity—even if there were no other considerations.

In U. S. vs. World's Exposition, 56 Fed. 630, where the standing of the Government in a suit for injunction was challenged on the ground of lack of pecuniary interest, the Court, after deciding that the Government did in fact have a pecuniary interest, observes (p. 638, bottom):

> "and besides it is under the highest obligations of honor and law to protect the property and interest of foreign nations and of the sev-

eral States of the Union, and of all exhibitions brought here by its invitation. * * * Having such * * * and having no other means of enforcing obedience to its regulations, the Government is entitled to the assistance of the Court. * * * There are other rights and equities quite as sacred as dollars and equity protects against injuries which cannot be measured in money. * * * "

and on page 640: **[38]**

"The right of the Government to maintain a Bill in Equity on the ground of obligation or duty either to an individual or to the public when it had no pecuniary interest is affirmed in several instances by the Supreme Court."

U. S. vs. S. J. Tin Co., 125 U. S. 273.

U. S. vs. Beebe, 127 U. S. 338.

U. S. vs. Marshall, 129 U. S. 579.

Cartner vs. U. S., 149 U. S. 662.

The foregoing considerations dispose of the case at bar and call for the issuance of an injunction as prayed for by the Government.

Plaintiff also bases the right to an injunction on the allegations in the complaint, and the proof offered in support thereof, that the defendants' structures are a hindrance to navigation and are in violation of the provisions of the Rivers and Harbors Act of 1899; so far as this contention is concerned, I am constrained to hold with the defendants—I do not think that the structures are a hindrance to navigation.

Findings and decree may be prepared in accordance herewith.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Jun. 30, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy. **[39]**

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*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 263–K. A.

No. 1468–A.

UNITED STATES OF AMERICA
vs.
ALASKA PACIFIC FISHERIES, a Corporation, et al.

**Bill of Exceptions.**

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1916. J. W. Bell, Clerk. By ————, Deputy. **[40]**

*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 263–K. A.

No. 1468–A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Defendants.

BE IT REMEMBERED, that this cause came on regularly for trial on the 15th day of June, 1916, before the Honorable Robert W. Jennings, Judge of the above-entitled court, upon an order to show cause why the defendants should not be enjoined, during the pendency of the action, from maintaining a fish-trap in the navigable waters of the United States to the westward of Annette Island, within 3,000 feet of the shore of Annette Island; the plaintiff being represented by John J. Reagan, Assistant United States Attorney, and the defendants being represented by Hellenthal and Hellenthal, C. H. Hanford and J. M. Shoup, and all parties being regularly before the Court, the following proceedings were had:

The plaintiff, to maintain the issues on its part, read in evidence the affidavit of Walter J. Elliott

and Earl E. Jones, which was in words and figures as follows, to wit: [41]

*In the District Court for the District of Alaska, First Division, at Ketchikan.*

No. 263–K. A.

No. 1468–A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

**Affidavit of Walter J. Elliott and Earl E. Jones.**

United States of America,
District of Alaska, Ketchikan,—ss.

Walter J. Elliott and Earl E. Jones, being severally duly sworn, each for himself and not one for the other, on oath depose and say: That Walter J. Elliott, the above-named deponent, is the Captain of the gas tug-boat "Leonine," and that E. E. Jones, the above-named deponent, is the engineer of said tug-boat; that on Sunday, May 21st, 1916, at 3:50 P. M. they left Metlakatla, Alaska, on said tug-boat, with said Elliott in charge thereof as Captain and said Jones as engineer thereof, and that they proceeded on said tug-boat thereupon to the west side of Annette Island, upon which island said Metlakatla is situated, to a point about four miles from Metlakatla aforesaid, and less than two thousand

feet south of Cedar Point on said Island, and there saw a fish-trap in process of construction, situate in the waters of Alaska surrounding said Island and about two thousand feet from the shore thereof; and then and there saw a crew of men putting wire webbing on the hearts of said trap, new piling for which had recently been driven; that the webbing on the pot and spiller of said trap had already been placed thereon; that they also saw the tug-boat "William T. Muir" tied up near said trap, also then and there saw a pile-driver with no name thereon which affiants could discover, and also then and there saw the scow "Wanigian," but do **[42]** not know the names of the persons then and there working nor of the owners of said trap.

WALTER J. ELLIOTT,
EARL E. JONES.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal] C. Z. DENNY,
Deputy Clerk of District Court, Dist. of Alaska, Division No. 1.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of P. E. Harris, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First Division, at Ketchikan.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

**Affidavit of P. E. Harris.**

United States of America,
District of Alaska, Ketchikan,—ss.

P. E. Harris, being first duly sworn, on oath deposes and says: That he has heard read the affidavits of Walter J. Elliott and Earl E. Jones, copy of which is hereto attached, and knows the contents thereof. That within sixty days prior to the date hereof, the exact date he not being able to state, he had a conversation with Mr. Tom Heckman in the Stedman Hotel in Ketchikan, Alaska, concerning the trap mentioned in the attached affidavit; that said Tom Heckman is the Superintendent, Manager or Foreman of the Alaska Pacific Fisheries, a corporation, and in said conversation said Tom Heckman told affiant that his Company, to wit: **[43]** said Alaska Pacific Fisheries, was constructing said trap, and asked what he, Mr. Harris, intended to do in the matter, and affiant then and there told said Heckman that it was up to the Government of the United States; said Heckman then and there told

affiant that he, Heckman, had instructions to continue the construction of said trap from said Company or corporation, and that he, Heckman, also wanted to drive another trap for said corporation in said waters; that said Heckman, at that time said he knew about the lease then existing between the United States and affiant, and of the proclamation of the Government about to be published in regard thereto, and that his said Company also knew thereof.

P. E. HARRIS.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal] C. Z. DENNY,
Deputy Clerk of District Court, District of Alaska, Div. No. 1.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of Harry F. Geil, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First Division, at Ketchikan.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Defendants.

**Affidavit of Harry F. Geil.**

United States of America,
District of Alaska, Ketchikan,—ss.

Harry F. Geil, being duly sworn, on oath deposes and says: That during the first week of May, 1916, the exact date I am unable to state, I was at the west shore of Annette Island in the [44] First Division of Alaska, and then and there I saw the piling for a complete fishing trap which had just prior to that time been driven; that said trap was and is within three thousand feet of the shore of said Annette Island, and was and is approximately within two thousand feet therefrom, and said trap is purported to have been erected by the Alaska Pacific Fisheries, a corporation.

HARRY F. GEIL.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal] J. W. BELL,
Clerk of District Court, Dist. of Alaska, Division No. 1.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of Edmund Verney, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First Division, at Ketchikan.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

**Affidavit of Edmund Verney.**

United States of America,
District of Alaska, Ketchikan,—ss.

Edmund Verney, being first duly sworn, on oath deposes and says: That I am a Metlakatlan Indian, residing on Annette Island; during the year 1915 I was the Mayor of Annette Island; Annette Island has been my home ever since it was made a Reservation by Act of Congress approved March 3, 1891, to which Act reference is hereby made; that there have never been any fish-traps driven in the waters surrounding said Annette Island until the year 1914; during the year 1914 a trap was driven at Annette Point on the southeast short of said Island by John Davis & Son [45] who are Metlakatlan Indians, on a permit issued by the Secretary of the Interior of the United States, and under the authority and by virtue of said permit, permission to maintain said trap for one year being granted thereby, and permission to maintain said trap for another year, to wit, for 1915, was thereafter granted under the authority of the said Secre-

tary of the Interior; that in the year 1915 three permits were granted to Metlakatla Indians, to wit, Charles Brendible, Harry Lang and said John Davis and Son, to drive and maintain fishing traps for that year on the west coast of Annette Island, and I signed said permits as said mayor under authority of said Secretary of the Interior; that permission was never granted to any white man to drive or maintain any fish-trap in the waters surrounding Annette Island aforesaid; that no person other than a Metlakatlan Indian ever attempted to drive or maintain any fish-trap in said waters until the year 1916, during which year I am informed and believe that the Alaska Pacific Fisheries, a corporation, composed of people other than Metlakatlan Indians have driven and are maintaining a fish-trap on the west shore of Annette Island aforesaid, at Cedar Point; that the rights of the Indians residing on said Annette Island have always been maintained by them and respected by other people until the year 1916, when said Alaska Pacific Fisheries, a corporation, have claimed the right to have, constructed and maintain a fish-trap at said above-mentioned locations; and this last-mentioned instance is the first in which the right to drive and maintain fish-traps in defiance of the rights of the United States and of the Indian residents of said Annette Island under said Act of Congress approved Mar. 3, 1891, and of the subsequent proclamation of the President of the United States, dated April 28, 1916, has been attempted.

EDMUND VERNEY.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal] D. NOLL,
Notary Public for Alaska.

My commission exp. Nov. 1, 1917. [46]

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of D. Noll, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, Division No. 1, at Ketchikan.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Defendants.

**Affidavit of D. Noll.**

United States of America,
Territory of Alaska, Ketchikan,—ss.

D. Noll, being first duly sworn, on oath deposes and says: I am an assistant United States Attorney for the First Division of Alaska; I have heard read the complaint herein and know the contents thereof; that the lands and waters mentioned in said complaint are lands and waters of the United States, and are situated in southeastern Alaska, and are within the jurisdiction of this Court. That the said Annette Island and the whole thereof and *and* nearby islands has been made and is a reservation for the use of the Metlakatlan Indians and such other natives of

Alaska as may join them, which includes *ex necessitate* the waters surrounding the same and appurtenant thereto, and reserved from the use or occupation of any other person or persons, whatsoever. That said islands and the waters appurtenant thereto have been since the formation of said reservation in the sole, exclusive and peaceable possession of this plaintiff and said Metlakatlans. That plaintiff has for many years aided and assisted said Metlakatlans to develop along educational and industrial lines and in the matter of self-government, and as a part of such system of advancement is now encouraging and assisting them to engage in commercial fishing and the canning for commercial purposes of fish. That no person other than said Metlakatlan Indians has, [47] ever since the making of said reservation, been permitted by plaintiff to establish any fishing plants in the waters appurtenant to and surrounding said reservation. That the plaintiff has now made further arrangements for the upbuilding of said fishing industry for the benefit of said Metlakatlans, and has encouraged them to drive traps for the purpose of catching fish in said waters, and to permit interference by others and to allow the maintenance and operation of other traps or structures in said waters would be disastrous to said plans of plaintiff. The defendant for the purpose, among others, of thwarting the plaintiff in its said plans and arrangements, and of annoying, harassing and injuring plaintiff therein, and destroying said scheme and injuring said Metlakatlans, has driven a fish-trap on the west coast of said reservation at or near Cedar Point, and now

threaten, unlawfully and without right, and in defiance of plaintiff's rights and the rights and interests of said Metlakatlans, and after full knowledge and notice thereof, to maintain and operate the same, which if at all permitted will cause irreparable damage and injury to plaintiff and said Metlakatlans. That the erection of said trap is in violation of the Act of Congress approved March 3d, 1899, as set up in the complaint herein, in this, that no harbor lines have ever been established at Annette Island or on said reservation, and said trap is constructed in the waters of the United States without any authority from the Secretary of War, either prior or since the beginning of the same, and without the submission of any plans thereof or the approval thereof by the Chief of Engineers or said Secretary, and the plaintiff is entitled to a writ of injunction from this Court, preventing the maintenance thereof.

D. NOLL.

Subscribed and sworn to before me this 1st day of June, 1916.

[Seal] C. Z. DENNY,
Deputy Clerk of District Court, Dist. of Alaska, Division No. 1. [48]

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of D. Noll, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First Division, at Ketchikan.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Defendants.

**Affidavit of D. Noll.**

Territory of Alaska,
Ketchikan Precinct,—ss.

D. Noll, being first duly sworn, deposes and says that he is Assistant United States Attorney for the First Division, District of Alaska; that pursuant to instructions from the United States Attorney for the First Division, District of Alaska, I went to Annette Island, Alaska, on the second day of May, 1916, and posted a notice on the fish-trap mentioned in the complaint herein and also delivered a copy of the same to Mr. Jack Meyers, a representative and employee of the Alaska Pacific Fisheries in the capacity of watchman of the said trap. Also that I mailed a copy of said notice to the said Company; receipt of which was acknowledged by the said Company by its attorney, C. H. Hanford, Esq., of Seattle, Washington. That the said notice so posted and delivered to the said defendant was as follows:

"Ketchikan, Alaska, May 2, 1916.

To Alaska Pacific Fisheries and Jack Meyers.

By virtue of a proclamation signed by the President April 28th, 1916, three thousand feet of waters contiguous to Annette Island, Alaska, has been set aside for the exclusive rights of [49] the Metlakahtlans.

You are therefore hereby warned against trespassing on the said reserved area of waters and to cease driving or attempting to drive any traps for the purpose of catching fish within the said area and to cease fishing any traps within the said area.

D. NOLL,

Assistant United States Attorney."

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal] J. W. BELL,

Clerk of District Court, Dist. of Alaska, Division No. 1.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of Charles D. Jones, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First Division, at Ketchikan.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

**Affidavit of Charles D. Jones.**

United States of America,
District of Alaska, Ketchikan,—ss.

Charles D. Jones, being duly sworn, on oath says: I am the representative of the United States Bureau of Education, at Metlakatla, Alaska, with general supervision over the natives on Annette Island reserve. That the Government of the United States has recently made arrangements whereby the native inhabitants of said reserve may engage in commercial fishing, and operate a canning industry on said reserve as part and parcel of the Government's plan to better and further the industrial as well as the educational condition of said natives, and in furtherance [50] thereof the President of the United States recently issued a proclamation limiting certain waters surrounding said reservation, the same being waters of the United States, to said purposes; said waters are the shore waters and those contiguously beyond surrounding said reserve, in which the inhabitants of said reserve, the same being at present Metlakatla Indians, have fished ever since the creation of the reserve; that no others than the Indian inhabitants of said reserve have ever driven fishing-traps along the shores of said reserve, and that only upon permits granted by the Secretary of the Interior of the United States and by his authority, and the first permit being in the year 1914, and the next issues of permits being in the year 1915; that none others have ever driven traps in said waters or fished therein

or claimed rights therein as affiant is informed and verily believes, until the year 1916, when the defendants above mentioned began the erection of a trap on the west shore of said reserve near Cedar Point; that said defendant has been notified to cease operations at said point or in said waters, but has continued in defiance of said notice.

That the Government of the United States is now and for many years last past has been engaged in training the inhabitants of said reserve, with a view to making them industrious and self-supporting and self-governing, and said inhabitants place great reliance and faith in the said Government and in its plans and aims for them, so far as the same have been disclosed to them, and they feel that said defendant is a trespasser upon them and their waters and rights, and the moral effect of a continuance of said trap and the operation thereof in said waters will greatly weaken the Government in its endeavors in their behalf, and said reserve will be of little value to them if their fishing is encroached upon or taken away in any degree. That their greatest industry is fishing, and they will confine their fishing almost wholly to said waters if not molested.

CHARLES D. JONES.

Subscribed and sworn to before me this 31st May, 1916.

[Seal] D. NOLL,
Notary Public for Alaska,

My commission exp. Nov. 1, 1917. [51]

Filed in the District Court, District of Alaska,

First Division, June 1, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of D. Noll, which was in words and figures as follows, to wit:

*In the District Court of the United States for the District of Alaska, Division Number One, at Ketchikan.*

No. 263—KA.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

PACIFIC ALASKA FISHERIES et al.,
Defendants.

**Affidavit of D. Noll.**

D. Noll, being first duly sworn, upon oath deposes and says, that he is Assistant United States Attorney for the First Division, District of Alaska; that on the second day of May, 1916, A. D., he posted a notice on that certain fish-trap in question in the above-entitled action and personally delivered a copy of said notice to Mr. Jack Meyers, the watchman at the said trap, and further duly placed in the United States Mail a copy of said notice, addressed to the Pacific Alaska Fisheries, a copy of which notice is hereto attached and made a part of this affidavit; that in reply thereto he received a letter from Mr. Hanford, dated at Seattle, Washington, a copy of which said letter is hereto attached and made a part of this affidavit.

D. NOLL.

United States of America,
District of Alaska,
Ketchikan Precinct,—ss.

Subscribed and sworn to before me this 12th day of June, 1916, A. D.

[Seal] J. FILLMORE WARDER,
Notary Public for Alaska.

My Commission expires Aug. 29, 1918.

Rec'd copy of above, June 15, 1916.
HELLENTHAL & HELLENTHAL. [52]

**Letter, May 17, 1916, Alaska Pacific Fisheries to D. Noll.**

C. H. Hanford,
Attorney & Counselor at Law,
Colman Building,
Seattle.

May 17, 1916.

D. Noll, Esq.,
Assistant U. S. Attorney,
Ketchikan, Alaska.

Sir:

Responding the notice over your signature addressed to "The Pacific Fisheries Co. and Jack Myers "referring to a proclamation signed by the President setting aside for the exclusive rights of the Metlakatlans waters contiguous to Annette Island, and warning the parties addressed," to cease trespassing on the said reserved area and waters and to cease driving or attempting to drive any trap or traps for the purpose of catching fish within the said area and to cease fishing any traps within the said re-

serve," it is hereby assumed that said notice was intended for the "Alaska Pacific Fisheries, a corporation," which has under license lawfully issued by the Territory of Alaska, constructed a trap at a location previously occupied for taking Salmon and intends to drive another trap at a location previously occupied in public waters outside of the line of low tide and will maintain its right to take fish at said locations notwithstanding your notice aforesaid.

Said corporation denies that the President has lawful power to extend a reservation beyond the boundaries prescribed by an Act of Congress or to include Public navigable water.

In one way or another the validity of the rights hereby asserted will have to be adjudicated and I respectfully suggest that since this business is in your hands to some extent, as appears by said notice, the most expeditious manner of making an issue will be for you to initiate judicial proceedings.

Whoever may without judicial process use force to destroy the property of the Alaska Pacific Fisheries or to impede its [53] fishing operations under its license will be held to accountability for such wrongdoing.

Respectfully,
ALASKA PACIFIC FISHERIES,
By C. H. HANFORD,
Attorney.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of Ernest P. Walker, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, Division No. One, at Ketchikan.*

No. 1468–A.

No. 263–K. A.

UNITED STATES OF AMERICA

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.

**Affidavit of Ernest P. Walker.**

Territory of Alaska,
Juneau Precinct,—ss.

Ernest P. Walker, being first duly sworn, on oath deposes and says: I am Inspector Alaska Service, Bureau of Fisheries, and, acting under such instructions from my Department to co-operate with the Department of Justice in preventing the operation of the trap of the defendant herein at Annette Island and to proceed to the location thereof for the purpose of making investigations as to the conditions. I went to Annette Island and ascertained the position and location of said trap and found that the said trap is situated in Smugglers Cove on the west coast of Annette Island at Cedar Point; that off shore at that point are situated numerous rocks and reefs for some considerable distance waterward. That this trap is, as nearly as I could ascertain by

[54] sighting, practically entirely within the headlands of Smugglers Cove; that in sighting I was practically at the line of mesne low tide off Cedar Point and sighted to a like point on the southern headline of said cove; that had I sighted from the reef at Cedar Point the said trap is entirely within said Smugglers Cove. The lead of said trap begins parallel with the main reef at Cedar Point and about 175 yards from the innermost point of the cove and the outer extremity of the trap from said innermost point of the cove is not to exceed 1780 feet distant and is wholly within the waters of said cove measured from the reef aforesaid to the southern headland. That at the time I saw said trap, the heart walls were opened by means of shove-downs such as were used on fish-traps in the year 1914, and on account of which various prosecutions were had in this court. The tunnel thereof leading to the pot was closed. There is no way for a person having charge of said trap to weather the season without living upon said Annette Island. At present the watchman is on a small house scow anchored between the reef and the lead, but that arrangement would not afford protection in a storm.

I have marked out on a chart which I have signed "Ernest P. Walker—No. 1," the approximate position and location of said trap, and a line showing the 3,000 ft. limit mentioned in the President's proclamation, at Cedar Point, and I have also made a sketch of said trap, to measurement, which I have marked "Ernest P. Walker—No. 2," which may be used in connection with this affidavit.

There has never to my knowledge been any trap located at this point previously.

I made this trip and these investigations pursuant to telegraphic instructions from my Department as aforesaid.

ERNEST P. WALKER.

Subscribed and sworn to before me this 14th day of June, 1916.

[Seal] INA S. LIEBHARDT,
Notary Public.

My Commission expires September 29, 1919.

Rec'd copy of above June 15, 1916.

HELLENTHAL & HELLENTHAL. **[55]**

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of John J Reagan, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, Division No. One, at Ketchikan.*

No. 1468–A.

No. 263–K. A.

UNITED STATES OF AMERICA

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.

**Affidavit of John J. Reagan.**

Territory of Alaska,
Juneau Precinct,—ss.

John J. Reagan, being first duly sworn, on oath deposes and says: that he is Assistant U. S. Attorney of the First Division of District of Alaska. That this suit was instituted by him on behalf of the Attorney General with his approval. That the affiant is informed by various Department employees and believes and therefore alleges that the matter of issuing the proclamation of the President herein was a subject of discussion between the War Department, the Interior Department, the Department of Commerce and the Department of Justice of the United States, and after due deliberation and consideration the President issued the proclamation herein. That the area of waters reserved by the said proclamation was with the consent of the Secretary of War, and the matter of placing traps therein by the Metlakahtla Indians was considered by the Secretary of War and permission given by the War Department for their erection whenever desired, and instructions thereto given in letter of May 13, 1916, written by the Secretary of War and addressed to the Secretary of the Interior, carbon copy of which is hereto attached and referred to in this affidavit. That for many years the Government of the United States through its proper departments has been engaged [56] in improving the habits and conditions of the Indians upon this reserve and

that for the purpose of encouraging the fishing industry among the natives and otherwise aiding them to advance in the ways of civilized life, industrially, educationally and commercially, the Government of the United States through its President has reserved the waters as described in the proclamation for the use and benefit of the Metlakahtlans and such other Alaskan natives as have joined or may join them in residence on these islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce, and warning was expressly given to all unauthorized persons not to fish in or use any of the waters therein described or mentioned. That the President of the United States is authorized by the laws of the United States to establish the limits of various of the Indian reservations and that in issuing the proclamation aforesaid he was in fact delimiting the outer water boundaries of the said reservation. That no permission has been given to the defendant or any other person other than those mentioned in said proclamation, to locate traps on said islands. That the said waters and the lands underneath the same belong to the United States; that they are navigable waters of the United States. That under the Act of March 3, 1899, it was made unlawful to commence to build any structure in any of the waters of the United States unless authorized by the Secretary of War prior to the beginning of the same and upon plans submitted to and approved by the Chief of Engineers and the said Secretary, except within established harbor lines, and that no

harbor lines have ever been established in any of the waters surrounding or adjacent to said Annette Islands. That said structure of said defendant is unlawful under the terms of said Act of Congress, that it interferes with the plans and objects and business of the Government of the United States and that it is a purpresture and should be abated by order and decree of this Court. That the said defendant is a trespasser within said [57] waters. That said defendants have threatened to continue the maintenance of said trap and to take therein the salmon fish of said waters and to convert the same to their own use, and threaten to drive other traps within said waters at other locations and threaten to take fish at said locations, notwithstanding the establishment of said reservation and the orders and proclamations of the President of the United States. And affiant states that said defendant will do so unless restrained and compelled to remove said obstructions and structures by the order of this Court. That the maintenance and operation of said trap upon said island and in said waters has a great deterrent effect upon the efforts of the plaintiff in behalf of its work and business with reference to the inhabitants of said reserve; that said inhabitants are Metlakahtlan Indians and within a lifetime were in a state of savagery, and their relations with the Government have been hindered and interfered with by reason of statements made to them by persons unfriendly to the purposes and objects of the plaintiff with reference to said inhabitants; and the plaintiff having communicated to said in-

habitants its purposes and objects in the premises, to now permit unauthorized persons to interfere adversely to the purposes of the Government in this behalf would cause a demoralization of said inhabitants and partial if not entire distrust of the plaintiff and its intention and power to carry out and fulfill its promises and purposes as herein set forth and would tend to wholly destroy the objects and purposes of the plaintiff in behalf of said inhabitants and cause said inhabitants to lose confidence in the Government of the United States.

JNO. J. REAGAN.

Subscribed and sworn to before me this 14th day of June, 1916.

[Seal] INA S. LIEBHARDT,
Notary Public.

My commission expires September 29, 1919.

Rec'd copy of above June 15, 1915.

HELLENTHAL & HELLENTHAL. [58]

**Letter, May 13, 1916, Acting Secretary of War to Secretary of the Interior.**

COPY.

WAR DEPARTMENT.
WASHINGTON.

May 13, 1916.

The Honorable,
The Secretary of the Interior.

Sir:

Referring to your letter of March 28th, 1916, transmitting a map showing the area around Annette and various other islands in Alaska, desired

to be reserved for the use of the Metlakahtla Indians, I have the honor to transmit herewith a chart on which is indicated by broken black lines the areas adjacent to Annette Island, to which fish-traps that the Metlakahtlans may desire to erect should be confined so far as practicable, in order that no obstruction to navigation may result. No traps should be placed in the buoyed channel immediately south of Annette Island, nor should access to the anchorages or the wharves at Ketchikan be obstructed.

Where this black line differs from the limits of the reservation laid out by the Interior Department, the limiting line of the reservation is indicated by red dotted line.

It is believed that favorable action without undue delay can be taken by this Department on applications by the Metlakahtlans for permission to erect and maintain fish-traps within the areas shown by the broken black lines. Applications for locations outside of those areas will however require an examination to determine whether or not they will interfere with navigation, before action can be taken.

Very respectfully,
(Signed) WM. M. INGRAHAM,
Acting Secretary of War.

One inclosure accompg. viz.: Chart, copy of 78187/317.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [59]

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of John J Reagan, which was in words and figures as follows:

*In the District Court for the District of Alaska, First Division, at Ketchikan.*

No. 263—K. A.

No. 1468—A.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, etc., et al.,
Defendants.

**Affidavit of John J. Reagan.**

United States of America,
Territory of Alaska, Juneau,—ss.

Jno. J. Reagan, being first duly sworn, on oath says: That he is the Assistant United States Attorney, who appears on behalf of the plaintiff in this hearing on order to show cause. That for many years prior to the commencement of this suit one William Duncan was, by permission of the plaintiff, engaged on the reserve mentioned in this action in teaching the inhabitants thereof; that for some years there had been a disagreement between him and the plaintiff in regard to the affairs upon said reserve, which resulted finally in the plaintiff assuming all control of affairs on said reserve; that growing out of said disagreement said Duncan used every means in his power to destroy the faith of the inhabitants of said reserve in the plaintiff, and in its

motives, aims and powers, and has a small following upon said reserve whom he is able to so control; that said reserve was made for the use of the Metlakatlans and native Alaska Indians who might join them upon said reserve; but the defendant since the beginning of this action through its agents has invaded said reserve and has circulated a form of affidavit of which the attached paper is a copy, and has endeavored to get some of the inhabitants of said reserve to sign same, and affiant is uninformed [60] as to how many signers said defendant procured thereto; but states that it might be possible to get those so controlled by said Duncan or some of them to so sign and not others; that the trespassing upon said reserve by said defendant as aforesaid upon the heels of its defiant entry into said reserve and its meddling with the plans and business of the plaintiff is one of the evils that it is the object of this bill to prevent and to keep off from said reserve, not only for a time, but altogether all persons not authorized to enter thereon and thereby prevent them from interfering with the plans and business of the Government thereon. That owing to the said opposition hereinbefore mentioned, and after the plaintiff had assumed control of said reserve affairs, a cannery that had been upon the reserve was fired by some incendiary and destroyed, and as affiant is informed and believes for the purpose of further thwarting and opposing the plaintiff in its said business, and affiant is informed and believes and therefore states that arrangements have already been made for the building immediately of another can-

nery and other factories upon said reserve, and the presence of the defendant thereon and its activities is a trespass and a damage to this plaintiff which cannot be remedied except by the order of this court continued as prayed.

JNO. J. REAGAN.

Subscribed and sworn to before me this 15th June, 1916.

[Notary's Seal] INA S. LIEBHARDT,
Notary Public for Alaska.

My commission expires September 29, 1919.

Rec'd copy of above June 15, 1915.

HELLENTHAL & HELLENTHAL.

**Blank Form of Affidavit Referred to in Affidavit of John J. Reagan.**

*In the District Court, for the Territory of Alaska, Division Number One, at Ketchikan.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Defendants. [61]

United States of America,
Territory of Alaska,
At Ketchikan,—ss.

We, the undersigned being severally duly sworn, each for himself and not one for the other, on oath deposes and say:

That he is now a resident and has been a resident

of the town of Metlakatla for many years, immediately last past; that the said town of Metlakatla is situate upon Annette Island, in the Territory of Alaska, and within the jurisdiction of this Court.

That on account of the Salmon Cannery at Metlakatla being recently destroyed by fire, and as said cannery will not be rebuilt during the present year, the residents of Metlakatla and the Annette Islands, will in no way be injured by the catching of salmon or other fish in the fish-trap now driven and completed at Cedar Point off the westerly shore of Annette Island, at about four miles in a westerly direction, from the said town of Metlakatla, during the fishing season of the present year, but on the contrary the operation of said fish-trap during the present year will be highly beneficial to the inhabitants of the said town of Metlakatla and the Annette Islands, for the reason that the fish caught in said fish-trap will supply the Chomley cannery with Salmon during the present fishing season, such cannery being only some thirty miles from said Metlakatla;

That the said cannery at Chomley gives employment to Metlakatlans while being operated, as the owners of said cannery have always furnished employment during fishing seasons to all Metlakatlans applying for work at said cannery when in operation.

That he has recently since the commencement of the above-entitled action, heard many of the residents of the said town of Metlakatla discuss the matter of the Cedar Point fish-trap not being allowed to operate by the Government, and that the general

sentiment of the residents is strongly in favor of the trap being fished by its owners.

That he believes that if a vote were taken of Metlakatlans [62] at this time, as to whether or not the said Cedar Point fish-trap should be operated or closed, that the vote would be almost unanimous in favor of the operation of the said fish-trap.

Subscribed and sworn to before me this 11th day of June, A. D. 1916.

_____,

Notary Public for Alaska.

My commission expires ——, 191—.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

Whereupon the PLAINTIFF RESTED. [63]

DEFENSE.

**Testimony of Charles A. Burckhardt, for Defendants.**

BE IT FURTHER REMEMBERED, that the defendants, to maintain the issues on their part, called as a witness CHARLES A. BURCKHARDT, who, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is Charles Burckhardt?

A. Charles A. Burckhardt.

Q. You live at Yes Bay?

(Testimony of Charles A. Burckhardt.)

A. I do in the summer-time, during the fishing season.

Q. Do you know the Alaska Pacific Fisheries?

A. Yes, sir.

Q. You are president of that corporation, I believe? A. Yes, sir.

Q. Are you familiar with its properties in the Territory of Alaska? A. I am.

Q. What canneries does it operate in Alaska?

A. One at Chilkoot, one at Chomley and one at Yes Bay.

Q. Do you know where those canneries get their fish supply? A. Yes, sir.

Q. Do you know where Annette Island is?

A. Yes, sir.

Q. Do you know where Metlakahtla is?

A. Yes.

Q. Are you familiar with the waters surrounding Annette Island? A. I am.

Q. You have read the proclamation of the President reserving a strip of navigable water 3000 feet in width around Annette Island? A. Yes.

Q. You know where those waters are situated, included within that proclamation? A. I do. [64]

Q. You are familiar with the cannery and other appliances that used to be situated on Metlakahtla Island?

A. To some extent; I never was ashore on Metlakahtla.

Q. You were never ashore? A. No.

(Testimony of Charles A. Burckhardt.)

Q. You have seen them, however, in passing by?

A. Yes, I have seen the buildings.

Q. You have personal knowledge of the business and operations of the Alaska Pacific Fisheries?

A. I have; I am General Manager.

Q. And the canneries at Chomley and Yes Bay, I believe, are operated under your personal supervision? A. They are.

Q. Now, Mr. Burckhardt, where does the Chilkoot cannery get its supply?

A. From Lynn Canal and Icy Straits.

Q. No part of the fish supply of the Chilkoot cannery comes from the waters surrounding that island? A. They do not.

Q. Where does the Yes Bay cannery get its supply of fish?

A. From the waters in the vicinity of Yes Bay, Beahm Canal, Clarence Straits and from these traps in the water surrounding Annette Island.

Q. To what extent is the Yes Bay cannery supplied with fish from the waters surrounding Annette Island?

A. It would be pretty hard for me to give you an estimate on that; it would depend a good deal on how the fish are running, whether we would get them for our Yes Bay cannery or for our Chomley cannery; the two canneries are run pretty much together. We figured in making up our requirements for the season that out of these t o traps we would get eight hundred thousand fish and they would go

(Testimony of Charles A. Burckhardt.)
to both canneries—the bulk of them would go to Chomley. [65]

Q. Some of these fish go to Yes Bay and the bulk of them go to Chomley? A. Yes.

Q. The bulk of the Yes Bay fish are caught in waters other than those surrounding Annette Island? A. Yes.

Q. The per cent of fish that are caught around Annette Island is comparatively small?

A. Yes, I would say somewhere about 10 per cent.

Q. What is the capacity of the Yes Bay cannery?

A. About 100,000 cases; we have made cans this year for 100,000 cases.

Q. In regard to the Chomley cannery, where is that situated?

A. Chomley cannery is on Chomley Sound, Prince of Wales Island, I would say about 30 miles from Annette Island.

Q. What per cent of the fish canned at the Chomley cannery are caught within the waters surrounding Annette Island?

The COURT.—Now, Mr. Hellenthal, you say within the waters surrounding Annette Island—

Mr. HELLENTHAL.—I mean within that reserve proclaimed by the President.

The COURT.—Very well.

A. I would say we figure on our estimated pack from Annette Island about 800,000 fish.

Q. When you say Annette Island—

A. I mean the waters.

Q. You mean the waters within 3,000 feet of the

(Testimony of Charles A. Burckhardt.)

shore, within this proclamation of the President?

A. Yes.

Q. What is the capacity of the Chomley cannery?

A. We have made cans there this year for 110,000 cases.

Q. What, if anything, has been done in the last year in regard to enlarging the Chomley cannery?

[66]

A. We have bought more machinery and made more cans this year.

Q. To what extent has the Chomley cannery been enlarged? A. 25,000 more fish.

Q. When did you commence the work looking towards the enlargement of this cannery?

A. Last February.

Q. When was the work completed?

A. During the spring—during this year.

Q. When was it completed with reference to the time the President's proclamation was issued?

A. It had all been completed—all our orders had been placed in the fall.

Q. All that work had been done prior to that time?

A. Yes, all our orders and all our obligations had been made during the fall.

Q. Now, what, if any, arrangements did you make with the view of getting fish for your Chomley cannery to meet its increased capacity?

A. This trap we put off Cedar Point.

Q. When did you take the first steps looking towards the construction of that trap?

A. It was some time in the month of August,

(Testimony of Charles A. Burckhardt.)

I don't remember the date, we had a diver come up.

Q. August of what year?

A. 1915. I had a diver come up and I went out with the diver and Mr. Heckman, superintendent of the Chomley cannery; I had him go down and sound whether we could drive off of this location; we found we could, and decided to put the trap in. I had been down there several times during the season and watched the fish run and saw there were a great many fish struck in along past that area.

Q. You are thoroughly familiar with the waters in that locality? A. Yes, sir. [67]

Q. And from your observation know how many fish ought to be caught in a trap at that point?

A. Yes—that is, as near as one can tell.

Q. Now, after you had determined that the site was feasible,—you have already explained what you did in the way of looking into the fish run at that point, Mr. Burckhardt, have you? A. Yes.

Q. What did you do in that regard?

A. I went down there several times with my boat, and laid off that shore there to watch the fish running along there.

Q. In what year was that?

A. That was last year; I went down there a couple of times the year before, but we didn't put it in last year, as we were not quite satisfied we could drive, and we finally struck on the idea of getting a diver and taking him up there.

Q. You were there in 1914 but you were not satis-

(Testimony of Charles A. Burckhardt.)

fied you could drive at that time and took a diver up in 1915? A. Yes, sir.

Q. What did you do after that, Mr. Burckhardt?

A. Ordered our piling and webbing for that trap.

Q. When did you order that? A. Last fall.

Q. That is the fall of the year, 1915?

A. 1915, some time during the month of October.

Q. Now, what did you do after that? Just tell the Court what you did in the way of building that trap—when you did it.

A. Well, the trap—I gave instructions to Mr. Heckman when he went north to drive that trap.

Q. When was that?

A. That was early in March.

Q. Of this year? A. Yes.

Q. When was the trap driven? [68]

A. I received a wire from Mr. Heckman on the 19th day of April that the trap had been completed.

Q. You don't know just when he started?

A. No.

Q. Now, when did you first learn of this proclamation of the President? A. On May 4th.

Q. How did you learn of it at that time?

A. I received a wire from the Assistant Secretary of the Interior advising me that the President had issued a proclamation setting aside the waters 3,000 feet surrounding Annette Island.

Q. Did you have any knowledge of the fact that the President intended to issue any such proclamation? A. I did not.

(Testimony of Charles A. Burckhardt.)

Q. Had you ever heard that the President was going to issue a proclamation until that time?

A. I did not.

Q. If you should be deprived of the right to operate that trap during the fishing season of 1916, Mr. Burckhardt, would you be able to put up your pack at your Yes Bay and Chomley canneries?

A. I don't think we would.

Q. To what extent would your pack be short at Chomley?

A. I figure that our entire pack would be short about 50,000 cases.

Q. That would be about the number of cases caught in that trap? A. Yes, sir.

Q. You have been in the fishing business for how many years, Mr. Burckhardt? A. Ten years.

Q. And are familiar with the habits of fish, and with the methods employed in catching fish?

A. Yes, sir.

Q. And know what quantity of fish a trap ought to catch under [69] given conditions?

A. Yes, sir.

Q. And you know how many fish this trap should catch? A. Yes, sir, under normal conditions.

Q. I want you to explain to the Court what kind of a trap it is—how it compares with the other traps in southeastern Alaska as to the number of fish that would be caught in it under normal conditions.

A. Well, it is a regular pile trap, double spiller trap and hearts, and lead of about 1,000 feet, and it

(Testimony of Charles A. Burckhardt.)

is placed where there is a good run of fish; a great many fish pass there—I think one of the best points I have ever seen.

Q. And the trap, in your judgment, ought to catch how many fish during the season of 1916?

A. That trap ought to catch 600,000 fish; I make that estimate because we have another trap on Gravina Island which I do not consider as good as this, and we caught that many fish there last year.

Q. What, if any, provisions have you made, and your company made, to pack the fish to be caught in that trap?

A. We have employed all of our labor, made our Chinese contracts, bought all of our supplies from our people.

Q. You have employed the labor and made your contracts with the view of making—

A. 110,000 cases.

Q. Now, tell the Court how many cases you would be short if that trap is not operated?

A. About 50,000 cases, as near as I can estimate under normal conditions.

Q. I would like to have you explain to the Court, Mr. Burckhardt, the way your labor is employed.

A. Our labor is employed by the season; all of the Chinese are employed at so much per case; the white men, some of them at so much a month; the foremen, superintendents and some of the [70] machinists are employed by the season.

Q. The contract you make with the Chinese labor is by the season at so much a case?

(Testimony of Charles A. Burckhardt.)

A. Yes, sir.

Q. And you have to pay for that labor whether you put up that many cases or not? A. Yes, sir.

Q. As I understand, you have employed Chinese labor to put up 110,000 cases at Chomley this season?

A. Yes, sir.

Q. And if you should put up 50,000 cases less, you would have to pay that labor anyhow?

A. Yes, sir.

Q. Pay for the 50,000 cases whether you put them up or not? A. Yes, sir.

Q. How is that about other supplies?

A. Well, take, for instance tin plate; there would be some depreciation on our tin plate we would have to hold over, we would have our money tied up in that, and we would have our money tied up in boxes.

Q. There would be a depreciation but no absolute loss?

A. Oh, no, but there would be some loss in the tin cans—there would be more or less loss in the tin cans on account of their being over salt water, they are bound to rust, and when we have carried them over there has been some loss.

Q. What would be your loss at Chomley cannery if this injunction should be granted? I want you to state in round figures how much you would be damaged if you could not fish that one trap on Annette Island this season.

A. I would say we would be damaged to the extent of about $50,000.

(Testimony of Charles A. Burckhardt.)

Q. I wish you would explain to the Court of what that damage would consist.

A. In the first place, we would lose about $15,000 on labor, [71] and I estimate if we have to carry that number of cans over there would be a depreciation of 25 cents a case on cans, which would be $12,500; and figuring on 50 cents a case as our profit, would be $25,000, and we have our money for this 50,000 cases of cans and materials tied up—it would amount to something like $75,000 in material, that we would lose interest on, and have to pay insurance on it, on the actual materials there; in round numbers our loss $50,000—actually our loss would be over $50,000, but I will say $50,000 to be safe.

Q. How much money, in round numbers, have you paid out for this year's supplies for your canneries?

A. For Yes Bay and Chomley alone we have paid out about $500,000.

Q. For Yes Bay and Chomley, without regard to the Chilkoot cannery? A. Yes, sir.

Q. For supplies that do not include labor and things like that?

A. That is supplies, material and advances on labor contracts.

Q. That is, your Chinese labor contracts?

A. Yes, sir.

Q. Now, your damage at Yes Bay, if this injunction is granted—what would that be?

A. I am taking the total, I am figuring it altogether.

(Testimony of Charles A. Burckhardt.)

Q. Now, you are familiar with the cannery at Metlakahtla, you say?

A. I am not familiar with the Metlakahtla cannery.

Q. You know there was a cannery there?

A. Yes, I have seen it going past in the boat.

Q. You know it has since burned down?

A. Yes, sir.

Q. Now, how long do you say you have been in the fishing and cannery business? A. 10 years.

Q. Do you know how long it requires to construct a cannery and get it in operation? [72]

A. Yes, sir.

Q. You know that cannery was burned down—you are familiar with that? A. Yes, sir.

Q. There is no cannery there now? A. No.

Q. Could a cannery be built at Metlakahtla if construction work was commenced now, and be gotten in condition to put up a pack this year?

A. It could not.

Q. Could any fish caught in the waters surrounding Annette Island or elsewhere be put up at Annette Island this year?

A. No, it could not, it would be impossible—even if they could secure the material, machinery and supplies it would be impossible.

Q. When do the fish commence to run, Mr. Burckhardt?

A. The fish are starting to run now; the big run is on from the middle of July to about the middle of August.

(Testimony of Charles A. Burckhardt.)

Q. When does it end?

A. The run is practically over by the first of September.

Q. Mr. Burckhardt, you are familiar with the waters in the vicinity of Cedar Point?

A. Yes, sir.

Q. And the locality of the trap? A. Yes, sir.

Q. How have you conducted your fisheries in the years gone by with reference to compliance with the laws in the construction of traps?

Mr. REAGAN.—I don't see how that is material in this case, if the Court please.

Mr. HELLENTHAL.—I will withdraw the question.

Q. What have you done, Mr. Burckhardt, in connection with the construction of this trap at Cedar Point as to complying with [73] existing acts of Congress in relation thereto?

Mr. REAGAN.—I object to that as immaterial.

The COURT.—Overruled.

Q. How is the trap situated with reference to other fish-traps—that is what I mean?

A. There is no other fish-trap near it.

Q. When you say near there, what distance is it to the nearest fish-trap? A. None within 4 miles.

Q. Either laterally or any other way, from the fish-trap? A. In no way.

Q. How is this trap situated with reference to the shore land of Annette Island?

A. It extends out into the channel, out into deep water.

(Testimony of Charles A. Burckhardt.)

Q. Is not up on the tide-lands? A. No.

Q. How far below tide-land?

A. It is driven below low-water mark.

Q. Considerably below low-water mark?

A. Yes, sir.

Q. Situated wholly in deep water? A. Yes, sir.

Q. Now, Mr. Burckhardt, what, if anything, have you been doing in your canneries in the way of employing the Metlakahtla Indians?

Mr. REAGAN.—I object to that as immaterial.

The COURT.—Overruled.

A. We have always given employment to natives of Metlakahtla; we have got a few of them in our employ at the present time.

Q. You have already employed some for this year?

A. Yes, sir; and they would have worked for us even if the cannery at Metlakahtla had been operated.

Q. If you should be deprived of the right to operate your [74] cannery at Chomley to its full capacity would you be able to employ as many of those natives as you would if it was operated to its full capacity? A. No, we would not.

Q. If you are allowed to operate the trap this season, during the pendency of this suit, where would you get your native labor from, to a large extent at least?

Mr. REAGAN.—I object to that as immaterial.

The COURT.—Overruled.

(Testimony of Charles A. Burckhardt.)

A. The Chomley cannery always get their Indian help from Metlakahtla.

Q. Always have? A. Yes.

Q. And intend to get them from there in the future?

A. Always have taken all we can get from there; one of the foremen of our cannery was Father Duncan's foreman in the Metlakahtla cannery, and ever since that cannery has not been operated he has been with us as foreman.

Q. How long since the Metlakahtla cannery has been operated? A. I think it is three years.

Q. Has it been operated since the Government deposed Father Duncan from there? A. It has not.

Q. If you should be prohibited from operating your Cedar Point fish-trap, Mr. Burckhardt, what effect will that have upon the employment of natives as applied to the natives of Annette Island?

A. We will not need as much help.

Q. You would not need as much help?

A. No; we probably would not need any Metlakahtlans at all this year, or very few of them, if we cannot get the fish.

Q. They would be deprived to that extent of employment?

A. As far as the cannery help is concerned. [75]

Q. You know, as a matter of fact, there is no cannery on Annette Island that could furnish them employment?

A. There is not, and there is no building there that could be used for a cannery.

(Testimony of Charles A. Burckhardt.)

Mr. HELLENTHAL.—I have a map here, your Honor, of that locality with Annette Island on it, Clarence Straits, Portland Canal, etc., and I want to offer that in evidence.

(Whereupon said map was received in evidence and marked Defendant's Exhibit No. 1.)

Q. What quantity of fish—about how many fish did you get from the waters surrounding Annette Island, within the President's proclamation, last year for the Chomley cannery?

A. About 300,000.

Q. In what trap were they caught?

A. In the trap known as the Brendible trap.

Q. Who owned that trap?

A. The Alaska Pacific Fisheries and Brendible.

Q. You were partners in the trap? A. Yes.

Q. And this trap you have now driven was driven to take the place of that one?

A. No, this trap is far below that one; that trap was up on the upper end of Annette Island.

Q. You need that trap besides?

A. Yes, sir.

Q. Can you get fish out of that trap?

A. We were stopped from driving that trap.

Q. You stopped operations as soon as the injunction was issued?

A. We didn't cease operations—as soon as the injunction was placed on us we couldn't go ahead.

Q. If no proceedings had been commenced against you, you would have proceeded to operate

(Testimony of Charles A. Burckhardt.)

that trap, also? A. Yes, sir. **[76]**

Q. That is the trap you got some fish from last year—300,000? A. Yes, sir.

Q. And also the previous year, Mr. Burckhardt?

A. No; last year only.

Q. Now, I call your attention to Defendant's Exhibit No. 1, and I wish you would mark on that exhibit with the letter "A" the point at which the Cedar Point trap is located—the trap in dispute in this case.

(Witness so marks map.)

Q. You are familiar with those waters, Mr. Burckhardt, I believe you have testified?

A. Yes.

Q. Now, how is that trap constructed with reference to its being an obstruction to the navigable capacity of the channel or an obstruction to navigation?

Mr. REAGAN.—I object to that as immaterial, if the Court please. The law says it shall not be built at all, without permission, no matter whether it is an obstruction or not; and it does not have to be an obstruction in order to come within the language and construction of the law.

The COURT.—That is immaterial, but I am disposed to let him testify on that if you lay the foundation for it, Mr. Hellenthal. I do not know now whether this witness knows anything about what is an obstruction to navigation and what is not.

Q. How was the trap constructed with reference

(Testimony of Charles A. Burckhardt.)

to its effect upon the navigable capacity of the channel?

A. The trap is right in front of a reef—a reef runs out there, and we maintain a bell and a light on the trap at all times; the bell is rung in foggy weather and the light is right there at night, and it is not an obstruction to navigation—there are no steamers pass there, anyway.

Q. Could it protect steamers from going on that reef?

A. In fact it acts more like a light-house for them than an obstruction; [77] it is an aid to navigation; I consider a fish-trap with lights is an aid to navigation; I have traveled around Alaska in boats and know that they are aids to navigation.

Q. You have traveled on ships about here a great deal yourself?

A. Yes, sir; I have traveled all over southeastern Alaska in my own boats as far as Cross Sound.

Q. You operate your own boats?

A. Yes, sir.

Q. In connection with your canneries?

A. Yes, sir.

Q. And have spent a good deal of time on those boats?

A. Yes, sir; I am on the boats nearly all summer; spend very little time at home.

Q. How does that trap protect any ship from going on that reef?

A. There is no ship has any business going in there.

(Testimony of Charles A. Burckhardt.)

Q. Would they be apt to get into trouble if there was no trap there?

A. They would be more apt to get into trouble if that trap wasn't there, because when they saw that light they would know there was something there.

Q. If the light wasn't there they would be more apt to go on that reef?

A. Whenever a master of a vessel sees a light he will keep away from it.

Q. How wide is the channel at that point?

A. Well, it is pretty wide—about 12 miles.

Q. Across the channel. How wide is it in the vicinity of the trap—is the water very rocky?

A. Yes, it is rocky; you can see the rocks all along the shore in through here. (Referring to map.)

Q. Would it be dangerous for a ship to go in there? A. Yes, sir.

Q. And the trap has the effect of warning them of the existence **[78]** and locality of those rocks?

A. Yes, sir.

Q. I think you have already stated that you have a bell on the trap, operated in foggy weather, and the light at night? A. Yes, sir.

Q. That is maintained there all the time?

A. Yes, sir.

Q. Now, you have been engaged for many years, I believe you testified, in the fishing business—do you know what devices are usually employed in catching salmon in the Territory of Alaska?

A. Traps, seines and gill nets.

Q. To what extent in southeastern Alaska are

(Testimony of Charles A. Burckhardt.)

traps employed in supplying canneries with fish?

A. Well, that would be pretty hard for me to say, I would be guessing at it; I don't know.

Q. Give your best estimate as to what per cent of the fish in southeastern Alaska are caught in traps.

A. I would say close on to 75 per cent of the fish that are gathered in southeastern Alaska are caught in traps.

Q. And what do you say as to your trap that you have at Cedar Point being the usual and ordinary device employed in catching fish here?

A. Yes, sir; it is the usual ordinary device.

Q. It is the usual ordinary device?

A. Yes, sir.

Q. It is the trap generally employed?

A. Yes, sir; it is a regular trap that is used around in this district.

Q. The same kind of a trap as is used by other fishermen throughout this district? A. Yes, sir.

Q. It does not differ particularly from other traps? A. No. **[79]**

Q. What is the cost of the trap—cost of driving it?

A. That trap, the cost is in the neighborhood of $4000.00.

Q. How long is the life of a trap?

A. Only one season; part of the web is good for two seasons, but practically the life of a trap is one year.

(Testimony of Charles A. Burckhardt.)

Q. Piles go out every year? A. Yes.

Q. If you are not permitted to fish the trap this season, the trap itself would be a total loss to you?

A. Yes, sir.

Q. There would be no trap there next year?

A. No.

Q. I hand you here, Mr. Burckhardt, a map, marked for identification Defendant's Exhibit No. 2, and ask you to look at that and state if you know what it is.

A. It is a map of the fish-trap location at Cedar Point.

Q. Made by an actual survey upon the ground?

A. Yes, made by Mr. Ryus.

Q. And that shows accurately the place at which it is located? A. Yes, sir.

Q. The straight line there shown as the location of the trap, comes even with the shore—the trap, however, as I understand your testimony, does not extend the whole length of that straight line?

A. No, sir; they take their marks to get the survey, and they had to have shore marks, and for that reason we had to show that line, and then go out to a spruce tree, and here is another one (indicating.)

Q. Now, will you take your pencil, Mr. Burckhardt, and mark on there approximately where the trap would be with reference to the shore?

A. I could do it only approximately, it is not to scale. Now, say, this is the lead, supposed to represent 1,500 feet, I would say that it was approximately there (indicating.) **[80]**

(Testimony of Charles A. Burckhardt.)

Q. Will you mark that with the letter "B"?

(Witness so marks map.)

Q. Mark the other side of the trap with the letter "C"—the seaward side of it.

(Witness does so.)

Q. The trap, then, is approximately between B and C on that line?

A. Yes, approximately; it is probably over the C—probably comes out farther than that, I would say, about here would be the end of it (indicating).

Q. How near the shore is the seaward side of the trap—approximately how many feet from shore is it? A. The end of the trap?

Q. How far to the seaward is the shoreward end of the trap from the line of ordinary high tide, approximately? A. About 600 feet.

Q. Now, how far to the seaward is the shoreward end of the trap from the line of extreme low tide, approximately? A. How far out?

Q. How far to the seaward?

A. From extreme low water?

Q. Yes.

A. Somewheres close on to 200 feet—you mean where the lead begins?

Q. Yes, the point that is nearest the shore.

A. How far the lead is from low-water mark?

Q. Yes.

A. I would say approximately 200 feet.

Q. There is no part of the trap, then, situated closer than 200 feet to the line of extreme low water along the shore of Annette Island? A. No.

(Testimony of Charles A. Burckhardt.)

Q. And no part of the trap is situated nearer than 600 feet from **[81]** ordinary high tide?

A. No.

Q. Is any part of the trap built on tide-land or flats?

A. No; the trap is all outside of the low-water mark.

Q. In deep water? A. Yes, sir.

Q. In deep water and not on the tide-land?

A. Yes, sir.

The COURT.—The lead and all?

A. Yes; there is none of the lead on high-water mark; it is all below low-water mark.

Q. Is any part of the trap attached to the island at all? A. No.

Q. Do you make any use of the shore or tide-lands? A. No.

Q. None whatever? A. No.

Q. You remain entirely in deep water?

A. Yes, sir.

Q. Your watchman, how does he stay there?

A. He stays there in a house-boat on a scow; he has strict orders to remain off the Island—to take nothing from the Island.

Q. Is there any intention on your part to enter that Island or go upon that Island? A. No, sir.

Q. Or extend a lead from shore, or go anywhere near the Island? A. No, sir; we don't.

Q. Any nearer than 200 feet below low-water mark? A. No, sir; we don't.

(Testimony of Charles A. Burckhardt.)

Q. Would the operation of your fish-trap in any way effect the Island itself? A. No, sir.

Q. Would it obstruct access from the deep water?

[82] A. No.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. REAGAN.)

Q. The name of your Superintendent is what, Mr. Burckhardt? A. T. A. Heckman.

Q. How long has he been superintendent?

A. He has been in my employ as superintendent since 1908.

Q. That would be 8 years? A. Yes, sir.

Q. He is familiar with conditions around there, is he? A. Yes, sir.

Q. Did he tell you he had been employed by Brendible to make a survey of the trap site?

A. No, sir.

Q. You didn't know that? A. No, sir.

Q. Did you ever hear of it? A. No, sir.

Q. Not at all; and you say he had charge of the operations for the survey of this trap site?

A. Yes, he had charge of them; I was there with him.

Q. Who suggested this site, you or he?

A. I did.

Q. How did you know about it?

A. I had been around there and I had seen it and saw that it was a likely place.

(Testimony of Charles A. Burckhardt.)

Q. Do you know whether he made a survey for Mr. Brendible?

A. Not at that point—he did at the upper end. We had a diver in the spring come up and sound this location that the Brendible trap was in—that was near Walden Rocks—I wasn't present at the time.

Q. Then you don't know where it was, do you?

[83] A. I do know, yes.

Q. How do you know if you were not there?

A. Because they told me where it was, and the trap was put there.

Q. So if Mr. Heckman did discover this trap by reason of having been employed by Brendible to survey it, you don't know anything about it?

A. I know nothing about it, no; I never heard anything about it before.

Q. When was that cannery built at Chomley?

A. In 1911.

Q. When was the cannery built at Yes Bay?

A. It is one of the oldest canneries in Alaska—I think in 1908.

Q. Now, you say you have only been getting fish out of the waters within 3,000 feet of Annette Island last year? A. Yes.

Q. How did you get those fish?

A. Got those out of the Brendible trap.

Q. What was the process under which that trap was put up—I mean the legal process, if there was any?

A. We furnished the material and the webbing;

(Testimony of Charles A. Burckhardt.)

Mr. Brendible got out the piling in the winter-time; we paid him for the piling, and he did all of the work; we employed him and his son as watchmen on the trap, and paid them for their services; we took the fish and credited the fish to the trap at the prevailing prices we were paying others, and the profits were to be divided; but there was a loss in the trap last year and there was no profits, but he was paid for his services as watchman the same as we paid the other one, and he also was paid for his trap piling which he got out in the winter-time.

Q. Now, in order to operate that trap it was necessary to get a permit from the Annette Council, wasn't it? A. I don't know. **[84]**

Q. You never had anything to do with that?

A. No.

Q. Why didn't you drive the trap instead of paying Brendible to do it?

A. It was Brendible's location, and he wanted to know if we would drive it and furnish the material, on that kind of an arrangement, which we did.

Q. Isn't it a fact to your knowledge that the only way traps were driven on that Island at all until this year, until you drove yours, was this way, that a native of Metlakahtla Island gets a permit from the Secretary of the Interior or from the Annette or Metlakahtla council for the construction of a trap?

A. If they want to drive right at the shore.

Q. And they have always gotten those permits?

A. I never had anything to do with that part of it.

Q. And nobody but a native is allowed to build

(Testimony of Charles A. Burckhardt.)

a trap there, or to get a permit for a trap?

A. I don't know anything about that; the only thing I know is that Brendible came to Mr. Heckman, and Mr. Heckman came to me, with this proposition as I outlined it here, and said Brendible had found this location and was anxious that somebody should help him put the trap in, and wanted to know if the proposition was agreeable to me.

Q. Why didn't you drive the trap on your own account and leave Brendible out of it?

A. We don't do business that way.

Q. Cannery men don't do that?

A. I don't think so; I never heard of cannery men being any bigger robbers than anybody else.

Q. You haven't heard of any litigation either here or at Ketchikan about the jumping of traps?

A. We haven't had any. **[85]**

Q. Now, Brendible didn't have a stick driven in that ground, did he?

A. That doesn't make any difference. Mr. Brendible came to our man, Heckman, and told him he had this location and asked him if he would get the money or furnish the material to put in a trap, and we said we would, which we did. What do you want us to do—find out what he had and then go and steal it from him?

Q. I am not answering your questions, you answer mine. If Brendible also discovered this point at Cedar Point and got Mr. Heckman as surveyor to survey the trap—

(Testimony of Charles A. Burckhardt.)

A. I told you Mr. Brendible did not discover that site, that I discovered that site, and this trap was driven at my instigation—I told Heckman I wanted him to drive that trap.

Q. Is Mr. Heckman present?

A. No, he isn't here, we couldn't all be up here—I am sorry he is not here.

Q. You made an arrangement with Brendible—first Brendible looked at a place he thought would be a good site for a trap and because of that discovery you made an arrangement with him that you would pay him for the piles that he himself took out, that you would pay for the trap, that you would pay him a salary, and also his son, and that you would divide the profits from the trap? A. Yes, sir.

Q. And you did that without any permit being granted by the Annette council?

A. I don't know anything about that.

Q. You didn't know that the Annette Council grants permits for the building of fish-traps?

A. No.

Q. You didn't know that the Secretary of the Interior grants permits? **[86]**

A. No.

Q. How many years have you been in the fishing business? A. About ten years.

Q. And you never went on Annette Island in all that time?

A. I never have been on the Island—I have passed it in my boat.

Q. You never were on the Island while Father

(Testimony of Charles A. Burckhardt.)

Duncan was operating that cannery there?

A. I never went on the Island while Father Duncan was operating that cannery.

Q. Why not?

A. Because he did nothing but seine fishing—the fishing business has changed—we are driving farther to the sea; the Yes Bay and Chomley canneries are located in bays, and the other canneries have gone out below us and put in traps and catch the fish before they strike our traps and we have hard work to get fish, and that is why we got down in this District.

Q. In other words, the waters are fished out and you have to get farther away?

A. They are catching the fish before they get up to the streams; in the old days there were no traps in that district; the fish were all caught by the natives with seines, but now the fish are getting scarcer—other canneries have come in and driven traps below us and there are not as many fish come up to the bays as used to come.

Q. The result of all that you have said is that the waters have become depleted of fish and that you have to go farther away to catch them?

A. Yes, the waters become depleted out at the other end.

Q. What end do you mean?

A. Up at the end where the fish used to be caught in seines.

Q. How long have you been using traps to catch fish? A. Since 1907. [87]

(Testimony of Charles A. Burckhardt.)

Q. Now, since you began using traps in 1907, you used them first in the vicinity of your cannery at Yes Bay? A. Yes.

Q. And now you have to go farther away from Yes Bay? A. Yes.

Q. Why is that?

A. Because others have put in traps below us.

Q. And your traps won't catch any more fish?

A. There is not enough fish caught,—

Q. In other words, there is not enough fish, and as you said a few minutes ago, you have to go farther out to sea? A. Yes.

Q. And that is the fish history of this country, isn't it?

A. I think it is; the fish are in primer condition the nearer you get to the sea—they are better fish.

Q. If you will please pay attention to what I say and just answer my questions we will get along better—I just want facts.

A. I am giving you facts as near as I know them.

Q. If that is true, the operation of fish-traps around Annette Island will soon get to a point where you will have to move farther from Annette Island?

A. You cannot move farther from Annette Island.

Q. Why not?

A. Because there is nothing below you, unless you go to Duke Island.

Q. You cannot go any farther? A. No.

Q. That is the last place you can go to?

A. About as far as you can go.

(Testimony of Charles A. Burckhardt.)

Q. If you fish it out the natives won't have anything left, will they?

A. Do you think I am going to fish it out?

Q. You answer my questions—I am not here to answer yours. [88] You say this is the last place you can go, therefore if you fish it out the natives won't have any fish left, will they?

A. What is the difference whether I am catching the fish over here or over here? (Indicating).

Q. I wish you would answer my question.

A. I cannot answer that question. Ask me the question once more and I will see what it is.

Q. I say if you continue to fish there in those waters, and the same rule applies as to the fish getting farther away so that you have to go farther out to sea, there will soon be a time when you will have to go away from Annette Island—

A. You cannot go any farther.

Q. If you cannot go any farther that will end the fish business, won't it?

A. The fish are always going to come in; the fish come along the shores of Annette Island—that is their traveling ground,—they come along there and the tide sets them in close to the shore.

Q. The same rule, as I understand you, then will not apply to the fish swimming in the waters of Annette Island, that applies around Yes Bay, where you first started your traps, would it?

A. I don't think it will.

Q. Why not?

(Testimony of Charles A. Burckhardt.)

A. Because there is no chance to get below with many traps.

Q. That is a guess, isn't it?

A. No, it is not any guess.

Q. You haven't tried it out, have you?

A. We have had divers down below, yes, sir.

Q. That is contrary to all the other fish habits that you have learned, isn't it?

A. There are fish there—there are fish way below there—there are fish that come around Cape Shakon, but you cannot hold a trap there because the weather is too rough. [89]

Q. How much money did you expend on your cannery at Chomley last winter?

A. Last fall and last winter?

Q. Yes, I will add the fall too.

A. Well, it is pretty hard for me to tell you that offhand; I haven't my records with me.

Q. You have never operated a trap at Cedar Point before, have you? A. No.

Q. How do you know how many fish you are going to get in that trap?

A. According to my knowledge of the business; we prepare our packs at our canneries for the amount of gear we put out; we might make a mistake, but then everybody makes mistakes sometimes.

Q. You may make a mistake by a great many thousands of fish, might you not?

A. Yes, that is true; but we figure on so many cases, and we have found out that it requires so much

(Testimony of Charles A. Burckhardt.)

gear for that amount of profit.

Q. And if you don't come up to your expectations you suffer a loss? A. Yes, we do.

Q. That is the ordinary loss of business, isn't it?

A. We don't very often fall down.

Q. Sometimes you build traps that don't come up to your expectations, don't you?

A. Yes, sir; certainly.

Q. And that is an ordinary loss of business, isn't it? A. Yes.

Q. And sometimes you build a trap and it is taken out by the tide or storm?

A. I have heard of that, yes, but I have never had one taken out. [90]

Q. You know that such things happen?

A. Yes.

Q. Therefore if you build a trap you are not entitled, according to the laws of business, to absolutely depend upon a profit from that trap, are you?

A. There is no storm that can take that trap out at Cedar Point.

Q. It would be an ordinary business loss, wouldn't it? A. If the trap didn't catch any fish?

Q. Yes. A. Certainly would.

Q. Or if it was taken out by a storm?

A. It would be together on account of the storm.

Q. And if you built it there without lawful authority, if that should happen to be the conclusion of the Court, so you could not do business there and could not fish that trap, that would also be an ordi-

(Testimony of Charles A. Burckhardt.)

nary business loss, wouldn't it?

A. I wouldn't consider it so.

Q. Now, how much enlargement did you say you made to your Chomley cannery?

A. About 25,000 cases.

Q. I am not asking about cases, I am asking about the absolute addition you made to the building.

A. We have increased our capacity at the cannery so we can handle 25,000 cases more than we did the year before.

Q. And that increased capacity is an asset your company has?

A. It is an addition in buildings, and an addition in machinery.

Q. How much addition of buildings did you put there?

A. I think the expenditure was something like $3,500.00.

Q. What did you do—build an addition of some kind? A. Yes, sir.

Q. An extra room?

A. I think that is what it was.

Q. How much of a room was it?

A. I don't know. **[91]**

Q. And you spent in the actual addition of the plant—

A. $3,500.00, about—that is, as far as that is concerned.

Q. How much additional machinery did you buy?

A. I would say, offhand, somewheres around $15,000.

(Testimony of Charles A. Burckhardt.)

Q. What was that machinery?

A. Coolers, seamers and butchering machines.

Q. That is all good material, isn't it?

A. Yes, it is good material when you can use it.

Q. Suppose you didn't catch any fish at all in your traps, it would be good machinery just the same, wouldn't it? A. Wouldn't be much good.

Q. And you would have to dispose of it in the ordinary course of events the best way you could. When you bought that machinery you bought it with the expectation of having use for it? A. Yes, sir.

Q. And if you didn't catch any fish at this particular point you would try to use it at some other point, wouldn't you?

A. As I stated before, when we figured our improvements and our enlargements of our plant at Chomley and our supplies for this year, we took into consideration these new traps we were going to put in and the additional fish we would get from these traps.

Q. Now, you estimated to Mr. Hellenthal that you would take 800,000 fish out of this trap this season?

A. Yes, sir.

Q. Now, if that 800,000 were caught by the natives and sold to you—

A. I didn't say 800,000 out of that trap,—I said 800,000 out of the two traps.

Q. Well, if the natives caught those fish and sold them to you they would be better off than if they worked for you for wages, wouldn't they? [92]

(Testimony of Charles A. Burckhardt.)

A. They surely would, but they cannot catch the fish by seines; they are traveling fish, not in schools, and they cannot be caught in seines.

Q. They could be caught by other appliances, couldn't they?

A. There is nothing they can be caught in except by a trap; we have had seines down there and couldn't catch any fish with them.

Q. Did you know there was an arrangement made for the operation of that fishing industry at Annette Island, by which Mr. Harris was appointed by the Government for the purpose of operating that cannery?

A. I knew they contemplated making a lease.

Q. Did you know what the terms of that lease were? A. I did not.

Q. Didn't you know it was somewhat similar to the arrangement you had with Brendible last year?

A. I did not; I didn't know anything about the lease—I didn't know there was going to be a lease until this spring.

Q. And that lease was executed by the Government, and Mr. Harris was to operate that cannery—you would expect Mr. Harris would put in a trap himself, wouldn't you?

A. I don't know what he would do.

Q. You would expect him to do that, wouldn't you,—as a man who knows his business wouldn't you expect him to put in his own trap?

A. I don't know anything about what Mr. Harris would do.

(Testimony of Charles A. Burckhardt.)

Q. You know he is a cannery man, don't you?

A. I don't know that—I know he is in the fish business.

Q. Did you ever hear of a cannery at Hawk Inlet?

A. Yes, sir.

Q. Do you know who runs it? A. Yes.

Q. Who? A. Mr. Harris. [93]

Q. I thought you knew. Now, when you say that trap was completed on the 19th of April, what do you call a complete trap—just the driving of the piling, or do you call it a complete trap after the webbing is on, and the capping is on wherever you put caps, and it is in fishing condition?

A. I had a telegram from Mr. Heckman on the 19th of April that the trap at Cedar Point was completed.

Q. That is all you know about it?

A. I don't think he would telegraph me if it wasn't completed.

Q. If on the 21st day of May they were putting the webbing on the heart walls, and stringing some of the lead with webbing, then that trap was not finished on the 19th of April, was it?

A. They might have been out there patching the trap, or they might have been out there letting the web down—I don't know anything about that.

Q. But if two reputable witnesses testified that they were out there and saw them putting the web on the heart, and there is absolutely no reason to disbelieve them, then you would be mistaken as to

(Testimony of Charles A. Burckhardt.)

the trap being finished on the 19th of April, wouldn't you?

A. I don't know who these men are—whether they know a fish-trap when they see one.

Q. If they were there putting the webbing on the heart walls on the 21st of May, the trap wasn't finished on the 19th of April, was it?

A. If the web was not on the trap it was not completed, no.

Q. Now, you say you received information from the Secretary of the Interior in regard to this proclamation on the 4th of May?

A. From the Assistant Secretary.

Q. How did he come to notify you about it?

A. Because I was corresponding with him.

Q. How long had you been corresponding with him?

A. Some time about the middle of March, I think—I am not positive [94] of the dates.

Q. You were corresponding with him in regard to fishing in these waters, weren't you?

A. I was corresponding with him in regard to the Harris lease—I had heard of it and I wanted to get a copy of the lease—I wanted to see what was being done.

Q. You knew about the Harris lease, then, as early as last March?

A. I knew there was a contemplated lease, but I was advised by our representative at Washington that Secretary Redfield had interfered and that no

(Testimony of Charles A. Burckhardt.)

fishing rights would be given to anybody—that everybody would be treated alike in those waters; that there wouldn't be any special fishing privileges.

Q. You knew there was a question about the rights to fish in those waters as early as March, did you?

A. As I told you, I received word that there would be no special fishing privileges given anybody—it was to be left open—that the lease would not carry with it any special fishing privileges.

Q. Now, why did you figure that you would lose 50,000 cases of fish if you didn't operate this trap?

A. I don't know of any other place where I can put a trap—I don't know where to look for any down there.

Q. Supposing you didn't catch enough fish to make 50,000 cases, out of this trap?

A. Out of the two traps.

Q. Then, how much do you expect to lose if you don't operate this one?

A. I estimated 600,000 fish out of that trap, and 200,000 out of the Brendible trap.

Q. How many cases of fish would 600,000 fish make?

A. We figure about 16 fish to a case, right through, on an average.

Q. Now, at your own figures if you didn't catch any fish at all out of this trap, that wouldn't be more than 36,000 cases. [95]

A. And the construction of the trap is $4,000.00.

Q. I don't care about that.

A. Well, we will lose that.

(Testimony of Charles A. Burckhardt.)

Q. I am not asking you how much you will lose, I am asking you how many cases of fish you would lose if you didn't operate that trap?

A. As I say, I figured 600,000 fish out of that one trap, and 200,000 out of the other trap.

Q. That was an error in your estimate when you told Mr. Hellenthal that you estimated 800,000 fish out of this one trap?

A. Unless I misunderstood Mr. Hellenthal's question—I had no intention to deceive anybody.

Q. Now, how many Chinese do you employ at your Chomley cannery?

A. Well, I would rather answer that as Chinese and Oriental help—we have Chinese and Japs and it is pretty hard for me to figure them separately.

Q. And I suppose some Hawaiians and *Philippinos?*

A. We have sent 55 up there the first part of the season, and 25 more will go about the 1st of July.

Q. And the full crew of the Orientals will be about how many? A. Generally from 70 to 75.

Q. How many men do you employ besides Orientals? A. About 60 or 70.

Q. More? A. Yes.

Q. What do you pay the Chinese and Japs—Orientals? A. 35 cents a case.

Q. How many cases do they put up a day?

A. We figure on putting up from 3,000 to 3,500 cases altogether.

Q. Do you have supply houses from which you furnish your men with goods, etc.? A. Yes.

(Testimony of Charles A. Burckhardt.)

Q. How much average wages does a Chinamen get at the end of the [96] season, for the last 10 years—I mean cash, I don't mean what he has spent in the store with your company?

A. They don't buy much—the Chinese don't buy much in the store. The Chinese contractors, as a rule, make those contracts; I would say a Chinese boy, when he gets out of the cannery there, would have all the way from—the Japs from $200 to $300, and the Chinese from $300 to $400; the Chinese foremen, we pay them $100.00 a month and a royalty.

Q. How much do the natives get?

A. The natives are paid by the hour.

Q. How much an hour?

A. The children—little boys and girls who work in the can loft, get 15 cents an hour; then they do other work, such as piling the cans in the coolers, and they get all the way from 25 to 40 cents an hour for that; and then along the line they get 25 cents an hour, 25 to 30 cents in the fish room, and some of them 35 cents an hour, and the Indians who pitch the fish up, they are paid by the thousand—they get 50 cents a thousand. We have two Metlakahtla boys who have been doing that for us for years.

Q. What proportion of native employees are children, girls and kids?

The COURT.—What is the object of all this?

Mr. REAGAN.—I want to get at his damages that he is claiming—I want to find out all about it—he makes the statement that he would lose his labor and I want—

(Testimony of Charles A. Burckhardt.)

The WITNESS.—I haven't included any native help in those items at all.

Q. You included your help—your labor, you said?

A. That is our contract labor and our white help.

Q. You didn't include this in that estimate then?

A. No, that is not in there at all.

Q. Now, what is your net profit on a case? [97]

A. From 50 to 75 cents a case.

Q. I understood you to say you paid out $500,000 this last winter for your canneries?

A. $500,000 we have paid out up to the present date.

Q. For how long a period?

A. For this season's operations.

Q. How has that been expended, and for what purpose?

A. For supplies, and materials for making up our pack for this year, advances on labor contracts—we make large advances on our Oriental help.

Q. You will run your canneries just the same if this trap is shut up, won't you?

A. We will run it as far as we can.

Q. You will use every one of these supplies you possibly can?

A. I want to use them all—that is what I bought them for.

Q. Ever run short? A. Of what?

Q. Of supplies? A. No.

Q. Haven't yet at any time since you have been in the cannery business?

(Testimony of Charles A. Burckhardt.)

A. I don't understand what you mean.

Q. Have you at any time, since you have been in the cannery business, run short of supplies so you have had to replenish your supplies—had to buy more before the season closed?

A. Sure, we have these things coming to us all the time, but you understand what I mean—for instance, in the canning business we buy our tin plate, our solder, our labor and all things going to make up the pack itself, is bought in the fall of the year—the box lumber, the nails, and all that material is bought early in the fall of every year, and the contracts with the men who engage the Chinese labor are made early in the fall, and we make advances on these labor [98] contracts, and those are the items I mean.

Q. Did you ever throw out any considerable quantity of these supplies—your boxes, or tin, or solder, or labor, or nails—did you ever throw any of them away, to any considerable extent?

A. We have thrown some cans away; when we haven't made our pack we had cans that became rusty.

Q. To what extent did you throw away cans?

A. We figure on all cans held over in the canneries that there is a depreciation of about 25 cents a case.

Q. But you use the supplies just the same, don't you?

A. If you were to sell them you wouldn't get that much for them; being rusty, they cannot be used for packing food products.

(Testimony of Charles A. Burckhardt.)

Q. Now, the shore around about Cedar Point there is rocky, isn't it? A. Yes, sir.

Q. It has reefs in it that run considerably out in the water, hasn't it? A. Yes, sir.

Q. It is not what you might call exactly a tide flat at all—there is no such thing as a tide flat there, is there? A. Yes, sir; there is a big tide flat.

Q. Whereabouts?

A. Right there at Cedar Point, runs out very shallow a long ways; most of the shores in that Annette Island district are very steep—there are 40 or 50 fathoms of water, and that is the reason these trap locations are so sought after.

Q. What is the deepest water you can drive a trap in?

A. It all depends on how long you get your piles.

Q. I want to know from your experience what is the deepest water you can drive a trap in?

A. We have never driven a trap in over 60 feet of water.

Q. It runs from 60 to 70 feet, doesn't it?

A. About 60 feet is as high as we have ever gone.

[99]

Q. And the lead extends up to shallow water, far enough so that you can get the fish that are coming along the shore? A. Yes, sir.

Q. And at this place it happened to be rocky and you began out below there, didn't you?

A. We didn't begin out below the rocky part.

Q. Now, there is the reef at Cedar Point—it is all

(Testimony of Charles A. Burckhardt.)

rock in here and way down to there (indicating), isn't it?

A. There are rocks scattered all through there; it is not rocky along in here, it is all sand. (Indicating.)

Q. The reason for going down there is because of this reef here, wasn't it? A. No.

Q. You know what that is, don't you? You know that represents that reef that runs out there, don't you? A. That reef doesn't show.

Q. It shows at low water, doesn't it?

A. At extreme low water it shows.

Q. About 175 yards from this point here. (Indicating.)

A. No, the trap starts about here—this is about where the trap comes out—you see he has drawn his line over here too far—the trap comes out here, more like this—it doesn't start there. (Indicating.)

Q. You haven't driven any piles here? (Indicating.) A. No.

Q. The first pile is down here? (Indicating.)

A. Below low-water mark.

Q. That is on account of the condition of affairs—you couldn't use it up here? (Indicating.)

A. That is because we had no right to go up there.

Q. What right did you have to go over there? (Indicating.) A. That is navigable water.

Q. Then, this is all built in the navigable water?

A. Yes, sir. [100]

Q. Did you get any permit from the Secretary of War? A. No.

(Testimony of Charles A. Burckhardt.)

Q. Did you submit any plans to the chief of engineers?

Mr. HELLENTHAL.—Oh, I object to that as immaterial; he said he didn't have any permit.

The COURT.—It is alleged in the complaint and is not denied in the answer.

Q. Right down here it was so rocky you had to suspend the web from this point to that point, didn't you? (Indicating.)

A. We couldn't drive there so we put a wire across to stretch the web down.

Q. From here to here it is good driving, isn't it? (Indicating.)

A. I don't know exactly—it is below low water approximately 65 feet.

Q. Now, you say there is no shipping there at that point? A. No.

Q. Well, then, there is no navigation to be aided, is there?

A. If any one were to go over there it would certainly be a beacon to them to keep away from that reef.

Q. Now, if you don't employ these Metlakahtla natives at your cannery, they will probably seek work some place else, won't they?

A. I suppose they will if they can get work.

Q. There has been no great distress among the Metlakahtlans on account of their not being employed at your cannery, has there?

A. Well, the majority of them are over there now, at Chomley.

(Testimony of Charles A. Burckhardt.)

Q. The Metlakahtlans are doing other work in that part of the country, aren't they—they are running gas boats?

A. Yes, we have bought several gas boats for them, too—six or seven.

Q. They are working at Ketchikan, working in the sawmill there, aren't they? **[101]**

A. There are very few of them on Annette Island now.

Q. They go wherever they can get work, don't they?

A. Yes, a great many of them go to ——— Island.

Q. And if there were industries on the Island that were not interfered with, they would stay on the Island, wouldn't they?

A. I don't know; they don't want to stay on the Island in the summer-time, they want to go off, go away camping—it is more fun for them.

Q. Now, what do you maintain this bell and light for on your trap—is it for the purpose of keeping people from running into the trap?

A. We are compelled by the Department to keep a light on there, and a bell.

Q. Is it for the purpose of protecting the trap?

A. Well, I guess it is for the purpose of protecting the trap and navigation—I don't think it is so much protection to the trap that it is put there as it is protection to navigation.

Q. Is there any regulation of any department of the Government requiring you to put a bell on your trap? A. Yes.

(Testimony of Charles A. Burckhardt.)

Q. Where do you get that?

A. The Department of War.

Q. Will you tell me where I can find a reference to it?

A. No; we have always had a bell and a light on them.

Q. These traps only last one season, you say, and they will have to be redriven next year?

A. Yes, sir.

Q. So when you put this trap in you only expected to run it this season? A. Yes, sir.

Q. And you expected to put in another trap up there next year? A. Yes.

Q. And as many traps around Annette Island as you could get [102] away with?

A. We had no intention of driving another trap there.

Q. You have two traps there?

A. We had two traps there, the Brendible trap and this trap.

Q. The Brendible trap is there now in the name of Brendible, isn't it?

A. Brendible and the Alaska Pacific Fisheries.

Q. The permit is in the name of the Brendible trap, isn't it?

A. We asked for the permit in our own name.

Q. Who did you get the permit from?

A. From the Secretary of the Territory.

Q. That is the only permit you have had?

A. Yes, sir.

Q. Isn't that the ordinary revenue measure on the

(Testimony of Charles A. Burckhardt.)

fish business that the Legislature passed here?

A. I guess it is.

Q. That is all the permission you ever got to construct that trap there? A. All I know about.

Q. Don't you know that Brendible got a permit from the Annette council to build that trap?

A. No.

Q. You never heard anything to the contrary, did you? A. No.

Q. You never heard that mentioned?

A. I stated before that I hadn't; if Brendible had any other permit I know nothing of it.

Q. Now, that cove in there just south of Cedar Point, Cedar Point being situated at its northerly extreme, is called Smugglers Cove, isn't it?

A. Yes.

Q. Now, from headland to headland of that cove, isn't your trap entirely within the cove?

A. No, sir. [103]

Q. Now, that is Cedar Point there, isn't it—that looks about like it to you, don't it? (Indicating.)

A. I don't know anything about whether this map is drawn to scale—it is a Government map—that is all right, that is Annette Island.

Q. It is published at Washington, D. C., by the Coast and Geodetic Survey.

A. That is all right.

Q. Now, from that headland here to that headland here (indicating), isn't that trap entirely within that cove?

A. No, the trap is not in there at all; the survey

(Testimony of Charles A. Burckhardt.)

will show where the trap comes.

Q. Well, I had it surveyed by Mr. Walker about three days ago and that is his survey—would you say that line is 3000 feet from the shore?

A. I don't know—what is the scale there?

Q. I want your opinion on it, as to whether the map is correct or not.

A. The map is absolutely correct as far as that is concerned, but I don't know anything about this (indicating); you can see the rocks around there that I have testified to—it might be 3000 feet—I can tell you exactly if you will give me a rule, I will mark out 3000 feet for you—I don't know whether that is 3000 feet or what it is.

Q. Your trap is within 3000 feet of the shore, isn't it? A. Yes.

Mr. REAGAN.—That's all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Mr. HELLENTHAL.—This map that has been identified as exhibit No. 2, I will offer it in evidence.

The COURT.—It will be received. [104]

(Whereupon said map was received in evidence and marked Defendant's Exhibit No. 2.)

Q. Now, Mr. Burckhardt, can you supply the Chomley cannery with fish from other sources if you are deprived of the privilege of operating the trap at Cedar Point? A. I could not.

Q. They couldn't be procured from other places this season? A. They could not.

(Testimony of Charles A. Burckhardt.)

Q. No way to buy them?

A. Everybody is working to full capacity, every possible location has been taken, the fishermen are all contracted with for their packs, and I couldn't get the gear to put in a trap this season.

Q. Other trap locations in that vicinity have all been taken? A. Yes, sir.

Q. There are none to be had?

A. None to my knowledge. I took that up with Mr. Heckman on my way north, and I asked him if there was any place he could get to drive a trap that would be worth having; and there are none left.

Q. Now, in reference to the location of that trap in regard to the navigable channel of those waters lying along the westerly side of Annette Island—is that trap in a channel that is followed by ships?

A. No, sir; it is not.

Q. Could ships follow along a channel in the vicinity of where the trap is? A. They could not.

Q. It is clear out of the line that any of the larger ships could possibly follow?

A. No ship could possibly travel in there.

Q. That channel lies to the seaward of the trap?

A. Yes, sir.

Mr. HELLENTHAL.—That's all. [105]

Q. (By Mr. REAGAN.) How large a boat could travel in those waters?

A. Oh, a fish boat—a cannery tender—I wouldn't say anything more than that.

(Questions by Mr. HELLENTHAL.)

Q. The fish travel past Smugglers Cove before

(Testimony of Charles A. Burckhardt.)

they reach your trap? A. Yes, sir.

Q. They come from the sea? A. Yes, sir.

Q. Mr. Reagan has been asking you about fish becoming depleted, and you have testified that you have had to go from time to time farther out to seaward to catch your fish? A. Yes, sir.

Q. Because others went ahead of you, is that the reason? A. Yes, sir.

Q. Is that due to the general depletion of the fish supply in the waters of Alaska?

A. It is not; it is simply because they are moving further toward the sea to get their fish.

Q. And one of the reasons is that the fish are better at that point?

A. The fish are better, and since the canneries have adopted the new canning system, the sanitary can, you have to have fresh fish. The old way, if the fish were a little stale you punctured the cans and heated them up to a point where they expelled those gases, but under the new system where the top is crimped on to the can you have to have fresh fish, and that is one reason that desirable trap sites are so much more in demand.

Q. The best way to catch fish is by traps?

A. The most sanitary way is by traps.

Q. And the further seaward you get the better fish you get? [106] A. Yes.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Mr. REAGAN.)

Q. And the traps farther in from the sea have

(Testimony of Charles A. Burckhardt.)

been abandoned, haven't they?

A. Some of them have been abandoned.

Q. And that is because they did not fish any more?

A. That is because they didn't get enough fish to pay to put them in—the fish are caught before they get up there.

Mr. REAGAN.—That is all.

WITNESS EXCUSED.

(Whereupon court adjourned until 10 A. M. tomorrow.) [107]

MORNING SESSION.

June 16, 1916, 10 A. M.

CHARLES A. BURCKHARDT, upon being recalled as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination.

(By Judge HANFORD.)

Q. Mr. Burckhardt, state what was the position of Thomas A. Heckman at the Chomley cannery in the year 1914–15? A. Superintendent.

Q. He was superintendent? A. Yes.

Q. Referring to the arrangement with Brendible for the operation of a fish-trap there on the shore of Annette Island, did the Alaska Pacific Fisheries have any contract in writing with relation to the construction or operation of that trap?

A. Not to my knowledge.

Q. No contract in writing? A. No.

Q. By whom was the contract made under which that trap was constructed and operated?

(Testimony of Charles A. Burckhardt.)

A. By Mr. Brendible and Mr. Heckman.

Q. Did you personally as President or Manager of the Alaska Pacific Fisheries participate at all in the negotiations or consummation of the agreement with Brendible or with the Metlakahtla Indians with relation to that trap?

A. No; the only part I took in that matter was that I approved of the plan that was submitted to me by Mr. Heckman.

Q. You gave your approval to it as it was submitted to you by Mr. Heckman? A. Yes.

Q. Now, as submitted to you did that agreement involve the payment of any fee for a license or permission to operate that trap? [108]

A. Not that I heard of.

Q. Is it possible that there could have been a payment made by Heckman for a license to operate that trap without your knowledge?

A. That is possible.

Q. If any such payment was made you have no knowledge of it?

A. No, I don't know anything of it.

Judge HANFORD.—That is all.

Cross-examination.

(By Mr. REAGAN.)

Q. Mr. Heckman then had some authority in the matter?

A. Oh, yes; Mr. Heckman was superintendent of the cannery under my supervision.

Q. You say you have three canneries, one at Chomley, one at Yes Bay and one at some place else?

(Testimony of Charles A. Burckhardt.)

A. One at Chilkoot.

Q. What is the output of the Chilkoot cannery?

A. 60,000 cases.

Mr. REAGAN.—That's all.

WITNESS EXCUSED. [109]

**Testimony of F. O. Burckhardt, for Defendants.**

The defendants, to further maintain the issues on their part, introduced as a witness F. O. BURCKHARDT, who, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is F. O. Burckhardt?

A. Yes, sir.

Q. Do you know the Pacific Alaska Fisheries?

A. Yes, sir.

Q. What is your connection with the Pacific Alaska Fisheries?

A. I am Vice-President of the Company and Superintendent of Chilkoot.

Q. Are you acquainted, in a general way, with the properties of the company? A. Yes, sir.

Q. You are acquainted with the Company's cannery at Yes Bay? A. Yes, sir.

Q. And the Company's cannery at Chomley?

A. Yes, sir, I am.

Q. You are familiar with the business of the company? A. Yes, sir.

Q. With its plans? A. Yes, sir.

(Testimony of F. O. Burckhardt.)

Q. With the work it has been doing in the past few years? A. Yes, sir.

Q. And the things it intends to do?

A. Yes, sir.

Q. Do you know where the Cedar Point trap is located? A. I do.

Q. Do you know when that was located?

A. Cedar Point trap was located during the month of August, 1915.

Q. By locating, Mr. Burckhardt, what do you mean? Explain that **[110]** to the Court.

A. I mean that during the month of August, 1915, the location was sounded and a diver was sent down to see whether it was possible to drive piles in that location, and it was found possible to drive a trap, so plans were made at that time to put in that trap for the season of 1916.

Q. It was too late to put it in for the year 1915?

A. Practically at the end of the 1915 season.

Q. So that the earliest time the trap could be put in was the next year?

A. As I remember, it was the 20th to the 25th of August, as near as I can recall at this time.

Q. Now, what was done pursuant to that by the company?

A. As far as this particular trap is concerned, or all of our operations?

Q. As far as your operations are concerned so far as they relate to the work done in connection with this trap.

(Testimony of F. O. Burckhardt.)

A. We made our estimate of the number of fish that would probably be caught in this trap in an ordinary season, and made our arrangements accordingly for an increased pack to that extent, bought all the materials in connection therewith and hired all the additional help that was necessary.

Q. Where was this increased pack to be put up?

A. The increased pack was to be put up principally at Chomley.

Q. At the Chomley cannery, and the arrangements you speak of in reference to the employment of additional help and the procuring of additional supplies and the enlargement of the cannery,—the cannery at Chomley was enlarged to some extent, was it not? A. Yes, sir.

Q. The enlargement at Chomley was made by reason of the location of the trap at Cedar Point?

A. Yes, sir. **[111]**

Q. Do you know what was done in the way of constructing that trap afterwards, or is that a matter of hearsay?

A. It is a matter of hearsay; I was present when orders were given and communications were received, but I did not give any orders personally, and I wasn't there personally at any time when the trap was being driven.

Q. Do you know whether the driving of that trap was in contemplation by the Company at all times between the 25th of August and the time it was completed? A. It was.

(Testimony of F. O. Burckhardt.)

Q. What do you know about that, Mr. Burckhardt?

A. I know we figured on driving that trap after we found it was possible to drive a trap at that location, and all our arrangements were made as soon as we got back to Seattle for the driving of the trap, and we bought all our supplies that would be necessary to take care of the increased amount of fish we would get from that trap, which we would operate, in addition to what we had operated in the year of 1915.

Q. Did you have any knowledge in the month of August, 1915, that there was any contemplated movement on the part of the Government to do anything with the waters surrounding Annette Island—anything unusual? A. No, sir.

Q. Leasing it or reserving it, or anything like that? A.No, sir.

Q. When did you first have any knowledge looking towards the leasing of Annette Island?

A. I think the first knowledge that I had was when I returned to Seattle, late in April, 1916.

Q. Those were the dealings in relation to the leasing of the cannery? A. Yes, sir.

Q. When did you get your first knowledge of the fact that the **[112]** President intended to or did create a reserve around Annette Island?

A. I think it was somewheres about May 4th.

Q. Prior to May 4th, or thereabout, did you have any knowledge whatsoever that the President ever intended to prevent anyone from fishing the waters

(Testimony of F. O. Burckhardt.)

in which the Cedar Point trap is located?

A. No, sir.

Q. Or that the Department or anyone else intended to take any steps to prevent you from fishing that trap? A. No, sir.

Q. You have been in the fishing business for sometime, Mr. Burckhardt?

A. I have been in the fishing business for seven years.

Q. Do you know how canneries are constructed?

A. Yes, sir.

Q. The length of time required in constructing a cannery? A. Yes, sir.

Q. You know when the fishing season commences and when it closes in the Territory?

A. Yes, sir.

Q. About when does it commence and when does it close? A. The big run?

Q. When does the fishing season first commence?

A. The fishing season in the Ketchikan district starts approximately on the 1st of July.

Q. How long does it continue?

A. It runs until the middle of September.

Q. Now, from what you know as a cannery man and fisherman, can a cannery be constructed on Annette Island,—or could a cannery be constructed anywhere in southeastern Alaska, construction to commence after this date and be completed in time to put up this year's run of fish? [113]

A. Under ordinary conditions it could not, and it

(Testimony of F. O. Burckhardt.)

would be more than impossible now under the extraordinary conditions that prevail this year—in fact it would be absolutely impossible to obtain most of the supplies needed for the operation of a cannery.

Q. Could a cannery be built at all this year and operated this year? A. No, sir.

Q. You are familiar with the trap site at Cedar Point? A. Yes, sir.

Q. Do you know about how many fish that trap ought to catch? A. Yes, sir.

Q. I want you to tell the Court, in your judgment as a cannery man and fisherman, how many fish that trap at Cedar Point, if permitted to fish this year, would catch.

A. Well, in all our estimates last fall we never figured that trap at less than 600,000 fish; as a matter of fact, we considered it one of the best, if not the best, location we had in Alaska for a trap site.

Q. Now, if you are prevented from operating this trap at Cedar Point, would you be able to obtain those fish anywhere else? A. No, sir.

Q. Are there other trap site locations open that are near enough to the Chomley cannery to be of use in connection with that cannery, that you know of?

A. I don't know of any trap sites that are open anywhere that are worth having.

Q. Could those fish be procured in the market?

A. No, sir.

Q. They are not for sale anywhere?

A. No, sir.

Q. Now, to what extent, Mr. Burckhardt, would

(Testimony of F. O. Burckhardt.)

the Pacific Alaska Fisheries be damaged in dollars and cents if they were prevented from operating that trap during the season of 1916? **[114]**

A. I would say that the damage would be at least $50,000.

Q. I want you to tell the Court now, upon what you base those figures.

A. Well, we base our figures on the trap at Cedar Point, and the Brendible trap, that they should bring in over 50,000, or at least 50,000 cases of fish, on which our profit should be 50 cents a case, which would be $25,000; the Cedar Point trap is in, and if we are not allowed to operate it we would lose what it cost us, and that cost about $4,000 to $5,000 to construct.

Q. Let me interrupt you a minute—if the trap is not operated this year, would you be able to use it next year? A. No, sir.

Q. It will go out during the season?

A. It will go out; some of the web can be used, but outside of the web that can be used I would say our damage would be in the neighborhood of $4,000 to $5,000.

Q. To that trap itself?

A. Yes. We will have these 50,000 cases of cans left over, and I have carried over cans in Chilkoot a number of times since I have been there and the damage on the cans has run all the way from 10 to 50 per cent—cans in the winter-time, the change in the atmospheric conditions will cause them to rust,

(Testimony of F. O. Burckhardt.)

and no matter how carefully you pack them away you cannot get away from it. I would say the damage to these cans would be at least 25 cents a case, which would be $12,500.

Q. What damage, if any, would you sustain as to the labor you have contracted for?

A. We have contracted for our Chinese labor at both of these canneries at so much per case, and this labor must be paid for whether the pack is put up or not, and if we should have 50,000 cases left over it would cost us 35 cents a case, less the price of 4 cents, which goes on to the making of **[115]** the cans, and 1 cent is for making the box, so what we would be out would be the difference between the 35 cents and 4 cents and 1 cent, or 30 cents a case, which would be $15,000 for labor for which we would get no return.

Q. Be an absolute loss to you?

A. Absolute loss; then there would be other loss, interest on our investment, our insurance, in addition to this amount,—it would easily be $50,000, if not more.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. REAGAN.)

Q. Did you ever have a trap at Cedar Point before, Mr. Burckhardt? A. No, sir.

Q. Ever catch any fish there? A. No, sir.

Q. On what do you base your estimate of the number of fish the fish-trap would catch, then?

(Testimony of F. O. Burckhardt.)

A. We base our estimate on the way the fish run in there, and the location of the trap, taking into consideration the way fish travel—the fish coming in, pass up that shore and the majority of them pass close to Cedar Point, and in my opinion the trap at Cedar Point is the best trap in that district.

Q. You mean the best constructed or the best location?

A. It is the best location for a fish-trap in that district.

Q. And you have never had a trap there before?

A. No, sir.

Q. You have never caught any fish there before?

A. No.

Q. Then that is simply a guess as to how many fish you would catch there, isn't it?

A. No, it would not be a guess at all; when you know how fish **[116]** run, how they travel, where they travel, how the tide sets, you can form an estimate of what you will get out of a certain trap in an ordinary season.

Q. When did you first commence to observe the fish at Cedar Point?

A. When did I first commence to observe them? Oh, I have known there were fish running in there since—the first time I ever observed any fish running in there was in 1914.

Q. About what time in the year did you observe them there?

A. Well, I couldn't tell you; it was during the fishing season, but I couldn't tell you the month.

(Testimony of F. O. Burckhardt.)

Q. How long were you there at that time?

A. I made two different trips there.

Q. The first trip.

A. Well, I wasn't there very long; I was there during one tide, and the next time I was there during one tide, the flood tide, that is when the fish were running.

Q. You stayed in your boat? A. Yes.

Q. Did you anchor the boat? A. Yes.

Q. Or did you tie it up somewhere?

A. No, we drifted there.

Q. When was the next time after 1914 that you went there?

A. I haven't been there since 1914.

Q. And you were only there during two tides, in 1914? A. Yes.

Q. Now, from the observations you made at those two tides two years ago you estimate you can catch 600,000 fish in this trap?

A. Yes—together with information I have received from there.

Q. What other information did you get?

A. Well, it is hearsay—I don't know whether you want it in **[117]** this or not.

Q. I want to know who told you?

A. It is from information I have gotten from conversations I have had with my brother.

Q. And Tom Heckman?

A. And Mr. Heckman and with Mr. J. R. Heckman, and Mr. George Rounsfell.

(Testimony of F. O. Burckhardt.)

Q. Now, you say you made soundings there in August of last year—who had charge of those soundings?

A. I will tell you where my information came from.

Q. No, if you know who had charge of those soundings, just answer that.

A. I will answer it as I can answer it.

Q. No, if you don't know, don't tell me; if you do know, tell me. A. I was at Ketchikan—

Q. No, answer that question.

A. Well, I am answering it.

Q. I want you to answer that question, if you know who had charge of those soundings.

A. I don't know absolutely.

Q. You don't know personally? A. No, sir.

Q. Who has charge of your soundings, generally, if you know? A. Where?

Q. Anywhere where you choose to sound for trap sites?

A. Well, I have had charge of them at times and Mr. Heckman has had charge of soundings at times.

Q. He is generally the one who had charge of them, or has had for the last two years, isn't he?

A. Not in my district he is not.

Q. Do you know anything about this district of your own knowledge? **[118]**

A. In a general way.

Q. Then, you don't know who had charge of the soundings—

(Testimony of F. O. Burckhardt.)

A. I know the diver has been out with my brother and he has been out with Mr. Heckman.

Q. Mr. Heckman has charge of this particular trap site, hasn't he?

A. I don't know what you mean by having charge.

Q. Well, he has supervision over it—he is superintendent, isn't he?

A. He was superintendent of the construction of that trap, yes.

Q. And naturally you would think he knew something about the soundings there if he was superintending the construction, wouldn't you?

A. I think he knew all about the soundings—no question about that.

Q. Do you know whether or not Mr. Heckman made more than one sounding operation there?

A. Whether the diver went down at more than the trap I have referred to?

Q. More than one trip when you made the soundings for this trap.

A. I don't know whether he had been out there at any other time or not.

Q. Is it customary or usual for your company to make soundings twice in the same location?

A. I have done that, yes; it is not customary; something may turn up that would make it necessary to send the diver down again.

Q. Well, if Mr. Heckman knew the conditions there from having made soundings, he would not likely make them over again, would he?

A. He might; he might want to find out if it was

(Testimony of F. O. Burckhardt.)

possible to run his lead in a different direction, or whether it was possible to run his trap out farther than his soundings took him. **[119]**

Q. Well, if he had made soundings at any time that satisfied him that it was a possible trap site, would he, under those conditions, make additional soundings?

A. I don't know why he would if he was satisfied everything was all right.

Q. Now, you know that the waters where this trap is located and where your other traps are located are waters of the United States, don't you?

A. They belong to the United States.

Q. And you know there is an inhibition in the law against the placing of any structure in the waters of the United States without permission from the War Department, don't you?

A. I don't know that.

Q. You don't know that?

A. No, I don't.

Q. Don't you know it now?

A. No, I don't know it now.

Q. You don't know that is the law?

A. No, sir.

Q. You never got any permission from the War Department for the construction of any of your traps, did you? A. Yes, sir; we did.

Q. Why did you do that?

Mr. HELLENTHAL.—We object to that—this man is not passing a law examination.

(Testimony of F. O. Burckhardt.)

The COURT.—Objection sustained.

Q. Now, do you suppose if there were any fish caught—you are a cannery man and know the condition of the fish market for canning purposes around Ketchikan and in that neighborhood?

A. Yes, sir.

Q. Do you know whether there would be a market for fish caught off Cedar Point, if you didn't catch them?

A. Surely there would be a market for them. **[120]**

Q. So if the natives went out and caught these fish they could sell them, couldn't they?

A. How are they going out to catch them?

Q. Answer my question.

A. If it was possible for them to catch them they could sell them.

Q. They would have a market for all of the fish they caught off Cedar Point, wouldn't they?

A. Yes, sir.

Q. And the market is such now that it is hard for you to buy enough fish? A. Yes.

Q. When your company put in that trap they knew it wouldn't be fit for service next year, didn't they?

A. Why, yes—as I said before, we figured that the piling would be gone, but part of the web could be used next year—how much of the web I don't know.

Q. Did you know that your brother had had any correspondence with the Secretary of the Interior

(Testimony of F. O. Burckhardt.)

this spring? A. I did not.

Q. Didn't know anything about that?

A. No; I left there very early.

Q. About how early?

A. I left Seattle, I think it was about the 24th of March, or even earlier than that, I think it was.

Q. Now, when you contract for your labor you have to pay your labor bills whether you catch the fish or whether you don't; is that it?

A. We pay our labor bills, yes.

Q. As a matter of business and as a matter of law you pay your labor for what you contract for?

A. Certainly.

Q. And when you contract your labor you estimate the labor you will require? [121]

A. We estimate the labor we will require on our estimated pack.

Q. And if you fall short of your pack you lose on that labor? A. Certainly.

Q. And if you exceed your estimated pack you are a little ahead, aren't you?

A. Yes, we are a little ahead.

Mr. REAGAN.—That's all.

(Questions by The COURT.)

Q. Mr. Burckhardt, I understood you to say in the Ketchikan district the fish begin to run about July 1st?

A. Well, they run before that, but there isn't much of a run; ordinarily we figure it about the 4th of July; there are fish running in there now, but not of any consequence.

(Testimony of F. O. Burckhardt.)

Q. Neither trap, then—neither the Brendible trap nor this trap at Cedar Point is fishing now?

A. No.

Q. And won't be fishing until about the 1st of July?

A. Well, if we were allowed to operate the Cedar Point trap it would be getting some fish now—when I said the 1st of July I meant fish of any consequence.

Q. That is when the run begins?

A. That is when the run begins.

Q. And the fish which come in between this time and the 1st of July are simply advance scouts, you might say—runners?

A. Yes, advance guards. Now, as far as the Brendible trap goes, we haven's put the Brendible trap in. The Cedar Point trap at this time would be getting some fish—I don't know how many, but it would be getting some fish.

Q. The Brendible trap is not in operation this year?

A. No, sir; we haven't put it in; we have another trap up above there, on Gravina Island, that last week caught, I think it was 300 fish, and if you take all of your traps and get 300 fish out of them you would get a day's run now and then. [122]

The COURT.—That's all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. The construction of the Brendible trap had not

(Testimony of F. O. Burckhardt.)

yet commenced before these proceedings to enjoin you were instituted? A. No, sir.

Q. You were unable to constuct the trap on that account, because you were enjoined from constructing traps on that Island generally and you just left the thing alone? A. Yes, sir.

Mr. HELLENTHAL.—That's all.

Recross-examination.

(By Mr. REAGAN.)

Q. And you say it is too late now to build a cannery? A. Yes, sir.

Q. Or to build a trap? A. No.

Mr. REAGAN.—That's all.

(Witness excused.) [123]

The defendants, to further maintain the issues on their part, read in evidence the affidavit of Joe Jenkins, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, Division No. 1, at Ketchikan.*

No. 263–KA.

No. 1468–A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

**Affidavit of Joe Jenkins.**

United States of America,
Territory of Alaska,—ss.

Joe Jenkins, being first duly sworn, on his oath deposes and says: I am trapman for Alaska Pacific Fisheries, a corporation, defendants herein, and have been in the employ of said corporation as trapman at all the times hereinafter mentioned; that on the 7th day of April, 1916, I went to the trap site known as Cedar Point, with a tow of piles, which said site is situate in a westerly direction from the town of Metlakatla and in deep water off the westerly shore of said island, and about 2,000 feet from extreme low-water mark, and on the said date, to wit, the 7th day of April, 1916, I commenced driving a fish-trap on said trap site and continued driving the same until it was completed on the 18th day of April, 1916. That all of the lead to said trap is driven in deep water and no part thereof is nearer than about 400 feet of extreme low tide and that no part of said lead is less than about 1,000 feet in distance from the shore line of Annette Island or the shore line of any land whatsoever.

JOE JENKINS. [124]

Subscribed and sworn to before me this ninth day of June, 1916.

JAMES M. SHOUP,
Notary Public in and for the Territory of Alaska.
My commission expires June 20, 1919.

Due service by copy admitted this 15th day of June, 1916.

JOHN J. REAGAN,
Attorney for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Jun. 5, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

The defendants, to further maintain the issues on their part, read in evidence the affidavit of Ernie Copeland, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, Division No. 1, at Ketchikan.*

No. 263–KA.

No. 1468–A.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Defendants.

**Affidavit of Ernie Copeland.**

United States of America,
Territory of Alaska,—ss.

Ernie Copeland, being first duly sworn, on his oath deposes and says: I am now the captain of the "Wm. T. Muir," which said boat is the property of the defendant corporation herein, that I am now captain of said boat and employed as such by the said de-

fendant corporation, and have been captain of said boat, and employed as aforesaid, at all times hereinafter mentioned; that heretofore, to wit, on the 7th day of April, 1916, I left the Chomley Cannery, the property of the said defendant corporation, with said boat having in tow a pile driver and a tow of piles, having on board of said boat the trapman together with a trap-driving [125] crew on said pile-driver; that I arrived at Cedar Point off the westerly shore of Annette Islands at the trap site known as Cedar Point, distant about four miles from the Town of Metlakatla and I remained at said trap site, with said boat the "Wm. T. Muir" and the said pile-driver, until a fish-trap was driven on said trap site; on the completion of said trap, on the 18th day of April, 1916, I towed said pile-driver from said trap site, the trapman and trap-driving crew leaving at the same time on board the said pile-driver:

That I have read over the affidavit of Joe Jenkins, subscribed and sworn to on this 9th day of June, 1916, regarding the location of said Cedar Point trap site and the distance that said trap and the lead thereto are from the shore line of Annette Island, and from my observations while said trap was being driven, at the time aforesaid, believe that the statements contained in said affidavit are true.

ERNIE COPELAND.

Subscribed and sworn to before me this 9th day of June, 1916.

JAMES M. SHOUP,
Notary Public in and for the Territory of Alaska.

My commission expires June 20th, 1919.

Service by copy admitted this 15th day of June, 1916.

JOHN J. REAGAN,
Asst. U. S. Atty.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

Whereupon the DEFENDANTS RESTED. [126]

REBUTTAL.

The plaintiff, to further maintain the issues on its part, in rebuttal, read in evidence the affidavit of John J. Reagan, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First Division, at Ketchikan.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES etc. et al.,
Defendants.

**Affidavit of John J. Reagan.**

United States of America,
Territory of Alaska, Juneau,—ss.

Jno. J. Reagan, being duly sworn, deposes and says: That the attached paper is a telegraphic copy of an affidavit executed by Charles Brendible on June 14th, 1916, at an hour too late to permit of its being forwarded by mail, therefore, upon request of

affiant same was telegraphed so that it may be used in the hearing of the show cause order herein.

JNO. J. REAGAN.

Subscribed and sworn to before me this 15th of June, 1916.

[Seal] INA S. LIEBHARDT,
Notary Public for Alaska.

My commission expires September 29, 1919.

[Title of court and cause.]

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES etc.,
Defendants.

**Affidavit of Charles Brendible.**

Chas. Brendible, being first duly sworn, upon oath deposes [127] and says that he is resident and inhabitant of Annette Islands Reserve, Alaska, that he is not in any manner interested or a party with the Alaska Pacific Fisheries Co., in the erection and maintaining of a fish-trap near Cedar Point, Annette Island, Alaska, that he has never at any time entered into any agreement with the aforesaid Company whereby it was to erect the said trap at the said location or at any other location at Annette Island, Alaska, that he is in no manner interested in the said trap and so far as he knows the said trap was built by the said company independent of any resident and inhabitant of the Annette Islands Reserve or Metlakatlan. Affiant further says that dur-

ing the month of May, 1915 A. D. he employed Mr. Tom Heckman, manager of the above-mentioned company to survey a trap site at the said point and talked with the said manager in regard to erecting a trap at the said site for the year 1916 A. D., but that he did not enter into any agreement with the said manager or any other officer or representative of the said company whereby the said company was to build the said trap; affiant further says that he is not possessed of any permit from the council of the Annette Islands Reserve to erect a fish-trap at the said location and has never represented to the defendant company that he had a permit for the erection of a trap at the said location and has never assigned or attempted to assign any such permit to the said defendant company.

(Signed) CHAS. BRENDIBLE.

Subscribed and sworn to before me this 14th day of June, 1916.

[Seal] D. NOLL,
Notary Public for Alaska.

Filed in the District Court, District of Alaska, First Division. June 16, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

The plaintiff to further maintain the issues on its part, in rebuttal, read in evidence the affidavit of John J. Reagan, which was in words and figures as follows, to wit: [128]

*In the District Court for the District of Alaska, District No. One, at Ketchikan.*

No. 263–KA.

No. 1468–A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

**Affidavit of John J. Reagan.**

Territory of Alaska,
Juneau Precinct,—ss.

Jno. J. Reagan, being duly sworn, on oath deposes and says: that he is Assistant United States Attorney for the First Division of the District of Alaska, representing the plaintiff at this hearing; that the plaintiff herein has at all times since the making of said reserve had control and supervision of said reserve and of the operations thereon of the said inhabitants thereof and of one William Duncan mentioned in defendant's answer as Father Duncan, and that at all times said Duncan was present on said island only with the consent of the plaintiff; that the plaintiff annually appropriated sums of money for many years for the use and benefit of said Metlakahtlans and the same was expended by permission of the plaintiff for the use of said Metlakahtlans by

the said William Duncan; that said sums amount in the aggregate to upwards of $15,000; that said William Duncan has at all times been amenable to the laws of the United States and to the supervision of the plaintiff; that all moneys devoted to the industrial, moral and educational concerns of said reserve and the inhabitants thereof were furnished either by the plaintiff or by philanthropic people and were furnished to said Duncan in trust for the uses and benefits of said inhabitants of said reserve and that out of said sums donated by said philanthropic persons and the sums appropriated by the plaintiff the inhabitants of said reserve were brought to a fair state of industry and civilization; [129] and that said Duncan by reason of differences with the plaintiff as to continuing the advancement of the inhabitants of said reserve along the lines indicated in this affidavit, was superseded by the Bureau of Education of the plaintiff wholly for the benefit of the inhabitants of said reserve and that whatever disloyalty there may be to the plaintiff on the part of a few of the inhabitants of said reserve is due solely to the influence and persuasion of said William Duncan. The defendant well knows and knew at and prior to the time it began the construction of said trap and intrusion in said waters that the plaintiff, as part of its administration of said reserve, never permitted any trap to be driven within the waters surrounding said reservation and through its Department of the Interior for the first time since the creation of said reserve granted a permit to a

Metlakahtlan to drive a trap in said waters and that subsequently it, said Department, created the Annette Council with authority to grant permits to build traps in said waters to the persons lawfully inhabiting said reserve, to wit, said Metlakahtlans; and defendant also knew prior to its intrusion in said waters and the construction of said trap that such permits were required from said Council or said Interior Department before any trap could be driven in said waters, and also knew prior to its intrusion in said waters and prior to the construction of said trap that such permits were granted only to the Metlakahtlans and other Indians residing on said reserve, and that others were not permitted under the regulations of the Secretary of the Interior to construct or maintain traps in said waters. And defendant knew prior to its intrusion in said waters and prior to the construction of said trap that the fish caught in said waters were disposed of wholly for the benefit of said Metlakahtlans and other natives inhabiting said reserve, and knew that it was a trespasser in said waters in entering therein and constructing said trap. And defendant also knew that heretofore it has obtained its supply of fish so far as the same are derived from said waters, by purchasing [130] the same from the Metlakahtlans who caught them, and that it can still do so.

JNO. J. REAGAN,
Asst. U. S. Atty.

Subscribed and sworn to before me this 15th day of June, 1916.

[Seal] INA S. LIEBHARDT,
Notary Public.

My commission expires September 29, 1916.

Rec'd a copy of above June 15, 1916.

HELLENTHAL & HELLENTHAL.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

**Testimony of John J. Reagan, for Defendants.**

Thereupon, upon the request of the defendants, JOHN J. REAGAN was called to the stand and testified in answer to questions as follows:

Cross-examination.

(By Judge HANFORD.)

Q. Mr. Reagan, how long have you been residing in Alaska? A. About 14 years.

Q. Are you personally acquainted with William Duncan? A. Yes, sir.

Q. Have you become, in any way, personally familiar with the operations of the colony on Annette Island since it has been inhabited by the Metlakahtlans? A. Yes, sir, officially.

Q. To what extent—in what way? Just explain to the Court what your actions have been that gave you personal knowledge of the matters you have sworn to in this affidavit.

A. Ever since I have been in the United States Attorney's office, first acting as United States At-

(Testimony of John J. Reagan.)

torney, and latterly as Assistant United States Attorney, the affairs of the Metlakahtla Indians have been under the supervision of the Department of [131] Justice, and under my supervision for nearly a year, and as Assistant United States Attorney all of these matters have been thrashed over in my office and in court and before the grand jury, and all of the statements that I have made here are statements made by Mr. Duncan himself, under oath, in the grand jury-room at Ketchikan.

Q. You are making a public revelation, now, are you, of testimony given in the grand jury room?

A. I am not; Mr. Duncan has also made those same statements to me in the office of the United States Attorney at Ketchikan, not once but many times.

Q. You state in this affidavit that Duncan's presence on the Island was with the consent of the plaintiff—where did you get that information?

A. From himself.

Q. From himself?

A. Yes, sir; he told me how he first happened to go there, and how he happened to get the place set aside as a reservation, and he told me where he came from, and his—

Q. I am asking now specifically about this consent of the plaintiff—was that by an Act of Congress, or by what authority was that consent given?

A. He got his consent legally, I suppose you would call it, by procuring an Act of Congress setting aside the reserve.

(Testimony of John J. Reagan.)

Q. Does that Act of Congress mention Father Duncan as being the only one permitted to occupy the island? A. It does not.

Q. Is there any other Act of Congress that specifically gives him permission to occupy that island?

A. To occupy the island with his natives—he brought them there and had charge of them.

Q. Now, isn't that just an inference of your own that that is included in this permission of the Metlakahtlans because he has been with them? [132]

A. It is not; I have had conversations with him and correspondence with the Department.

Q. In what way, and what correspondence have you got to base this statement on that the United States ever gave permission to William Duncan to occupy Annette Island?

A. There is considerable correspondence in the office.

Q. Is that as near as you can come to answering my question? A. Yes, that is about as near.

Q. Now, what knowledge have you with regard to the appropriation of sums of money for many years past for the use and benefit of the Metlakahtlans?

A. Statutes of the United States and Duncan's statements.

Q. Can you give reference to the statutes making those statements?

A. I cannot; I tried to find them yesterday, but I have seen them many times; and also Duncan's statements to me.

(Testimony of John J. Reagan.)

Q. What knowledge have you with respect to the sums of money being expended by permission of the plaintiff for the use of Metlakahtlans?

A. Mr. Duncan's own statements.

Q. Then you have only hearsay testimony to offer this Court as to the expenditure of money?

A. Well, I could have gotten more testimony if I had subpoenaed his books, but I didn't want to quarrel with him—but he admitted that to me.

Q. I wish you would give the definition of what you regard as "the expenditure of moneys devoted to the industrial, moral and educational concerns of said reserve"—what expenditure was there for industrial concerns?

A. I cannot segregate it, sir.

Q. Cannot segregate it?

A. No, no one but Mr. Duncan can do that.

Q. No one but Father Duncan can do that?

A. No; Mr. Duncan does not want to be called Father Duncan—he told me not to do that. [133]

Q. Isn't he generally known as Father Duncan?

A. Yes, they call him that but he objects to it.

Q. I don't want to offend him; I use it because I got in the habit of using it when speaking of him. What knowledge have you with respect to money being contributed by philanthropic persons and furnished to Father Duncan in trust for the use and benefit of the inhabitants?

A. Statements of Father Duncan.

Q. All his statements—do you know where the money came from that paid for the construction of

(Testimony of John J. Reagan.)

the salmon cannery that was on Annette Island that has been destroyed by fire?

A. Contributions made to Father Duncan, for the benefit of Metlakahtlan natives—especially one sum of something like $11,000 contributed by a Boston gentleman, whose name I don't recall, which was afterward returned to him out of the proceeds of the cannery.

Q. Have you any knowledge on that subject other than what you have obtained from hearsay, or information from Duncan himself? A. That's all.

Q. In regard to the sawmill on Annette Island and the water works and all the improvements that are there, is your knowledge with respect to the source of capital by which those things were provided derived in the same way, from statements of Duncan?

A. No, some of my knowledge comes from Statutes of the United States, some from official correspondence with the Interior Department, and some from correspondence from the Department of Justice.

Q. Was there ever any specific appropriation by Congress of money for a sawmill or water works, or any of these improvements?

A. No, sir; not that I know of.

Q. Do you know who superintended the construction of the cannery and the sawmill and the church and the other improvements [134] they have there? A. No, sir.

Q. You wouldn't state who superintended the construction of them? A. No, sir.

Q. You know the history of the Metlakatla tribe

(Testimony of John J. Reagan.)

and their emigration to Annette Island, do you?

A. Very meagerly from Duncan's statements.

Q. How long had the Metlakahtlans been occupying Annette Island before Congress took any action recognizing their right to be there?

A. Two or three years.

Q. Was that before or after you came to Alaska?

A. That was before.

Q. And your knowledge on that subject is such as you have obtained in a general way?

A. Historically.

Q. Has there been any written or public history covering that point?

A. Well, I believe there is but I haven't read it.

Q. Couldn't refer to any written history?

A. Somebody has written a book that Duncan didn't like, and other people have written about it, but I didn't pay any attention to it.

Q. In this affidavit that you read to the Court, the affidavit of yourself, you make statements in regard to the knowledge of these defendants with respect to what was done and contemplated about these fisheries—upon what do you base your authority for making the statements as to the defendants' knowledge on these subjects?

A. Statements made by Mr. Heckman, who is their foreman, or some such officer of the company.

Q. Have you had personal interviews with Mr. Heckman on these subjects? **[135]**

A. I have not; I have the sworn statements of others.

(Testimony of John J. Reagan.)

Q. Is that in evidence?

A. Some of it is; there are some affidavits there in which it is related.

Q. Then all that is involved in this affidavit of yours is simply an enlargement on affidavits made by somebody else that are already in the case?

A. Oh, no, by no means.

Q. You make this statement in your affidavit, "The defendant well knows and knew at and prior to the time it began the construction of said trap and intrusion in said waters that the plaintiff as part of its administration of said reserve never permitted any trap to be driven within the waters surrounding said reservation and through its Department of the Interior for the first time since the creation of said reserve granted a permit to a Metlakahtlan to drive a trap in said waters"—you state this as a positive fact, that the defendants knew that—now, how do you get the information as to the knowledge of the defendant on that subject?

A. The knowledge of their superintendent is their knowledge—he knew all about it.

Q. Their superintendent is who?

A. Mr. Heckman.

Q. Did Mr. Heckman communicate personally to you that he had any such knowledge? A. No.

Q. You state this on the authority of Mr. Heckman because somebody else has made an affidavit that Heckman had such knowledge?

A. Partially, and partially because Mr. Heckman lives there and knows the condition of every cannery

(Testimony of John J. Reagan.)

man down there, and knows the condition of your clients, and your clients know the conditions, too. [136]

Q. That is a pretty broad statement—you pretend now to tell this Court what every person in that vicinity knew—have you circulated among those people to such an extent that you know what they knew? A. I know they knew it.

Q. You sit there in that chair under oath and tell this Court that they do know it?

A. Yes, sir, I do just exactly that.

Q. You say in this affidavit, "And defendant knew prior to its intrusion in said waters and prior to the construction of said trap that the fish caught in said waters were disposed of wholly for the benefit of said Metlakahtlans and other natives inhabiting said reserve and knew that it was a trespasser in said waters in entering therein and constructing said trap."

A. Yes, sir; Mr. Burckhardt himself has so stated; he had an arrangement with Brendible last year and he knew what that arrangement was, and he knew he couldn't drive a trap there without a permit from the Annette Council given to Metlakahtlans, and he also knows that the Metlakahtlans had to pay out of the proceeds of the trap for the work done on it.

Q. You mean to make a direct contradiction of Mr. Burckhardt's testimony when he said he had no such knowledge?

A. His company had—maybe he personally didn't have it.

Q. His company had? A. Yes, sir.

(Testimony of John J. Reagan.)

Q. Can a corporation have any knowledge of facts or law except through the intelligence of its officers?

A. A corporation is bound to know the law the same as any other person.

Q. You assume then that this is knowledge that was imputed to the corporation by the law itself—that implies that there *there* is some law on the subject; can you cite this Court [137] to any law that prohibits fish-traps in the waters surrounding Annette Island except by permission of the Secretary of the Interior? A. Yes, sir.

Q. State the law, please.

A. The law creating the reserve, Act of March 3, 1891.

Q. I have here and show you a paper purporting to be a copy of the President's message and in which the only law on the subject that I know of is quoted—I wish you would look at that and see if that is a correct quotation of the law you are now citing to the Court. A. That is the one I refer to.

Q. Do you know of any other law which prohibits fish-traps in the waters surrounding Annette Island excepting this particular Act of Congress?

A. Yes, sir.

Q. This is all? A. Why, I know more.

Q. Is there any word or phrase in that law that is prohibitive of the exercise of the right of fishing in those waters? A. Yes, sir.

Q. Read it to the Court.

A. "Said Islands be, and the same are, hereby set

(Testimony of John J. Reagan.)

apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

Judge HANFORD.—That is all.

Whereupon the PLAINTIFF RESTED. [138]

## SURREBUTTAL.

### Testimony of C. H. Hanford, for Defendants (In Surrebuttal).

Whereupon the defendants, to further maintain the issues on their part, in surrebuttal, introduced as a witness C. H. HANFORD, who, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name, please.

A. Cornelius H. Hanford.

Q. Where do you reside? A. Seattle.

Q. How long have you resided there?

A. Well, since I first commenced to live in Seattle it is a matter of about 61 years.

Q. Do you know Father Duncan?

A. I have met him, yes.

Q. How long have you known Father Duncan?

(Testimony of C. H. Hanford.)

A. Personally not over ten years.

Q. What was the first time that you visited the colony in charge of Father Duncan?

A. I first visited the Metlakahtla colony when it was located in British Columbia, village of Metlakahtla, and about all I can tell in this matter, if you will allow me to give it in a narrative I can give it very shortly.

Q. All right, proceed that way.

A. In the month of August, 1887, I was a passenger on the steamship "Olympian," making the trip from Seattle to Lynn Canal, Sitka and other places. There was quite a large list of passengers making the summer excursion to visit Alaska at that time, and there was included in that list of passengers [139] Senator West, Senator Farwell and Senator Don Cameron—Senator West was from Missouri, Senator Farwell was from the state of Illinois, and Senator Cameron was from the state of Pennsylvania; there were other prominent public-spirited citizens of the United States making the trip—Colonel Elliott F. Shepard, publisher and editor of a newspaper in New York, and several members of the faculty of Harvard University and others whom I cannot recall to name them, but it was a company composed largely of distinguished American citizens. On the journey northward the passengers were joined by the Reverend Sheldon Jackson—I don't remember at what point he came on, but he made the remainder of the journey northward and returned with us. He was at that time actively engaged in educa-

(Testimony of C. H. Hanford.)

tional work among the Indians of Alaska, and became a source of information to the passengers on the boat, telling them all about Alaskan natives and so on, and he gave certain information about the Metlakahtla Indians, that became a subject of interest among all the passengers on the boat, especially these senators and prominent citizens. His information was generally to the effect that the Metlakahtla Indians were a remarkable people in themselves—that they had been formerly cannibals; that they had been converted to Christianity through the ministrations of Father Duncan—I cannot avoid calling him Father Duncan because that is the way we generally have known him—that they had become converted to Christianity and discontinued their savage practices, especially cannibalism and had made wonderful progress in becoming civilized and acquiring skill in mechanical arts, and along educational lines, and in their adoption of civilized habits; that these Indians were at that time in a state of revolt against the authorities of the Church of England, which had assumed jurisdiction over that village, by reason of a disagreement between Father Duncan and the Bishop as to certain rites in the ceremonies of the church [140] and the doctrines of the church, and because of this disagreement the Bishop had deposed Father Duncan from his position as being manager in charge of that village; that the Indians were in a state of revolt against the Bishop because Father Duncan had been deposed and they would not accept the dogmas and ceremonies that

(Testimony of C. H. Hanford.)

the Bishop insisted to be observed in their religious worship. On account of that information being given by Dr. Sheldon Jackson, the passengers became so much interested in the subject that they persuaded the Captain to call at Metlakahtla on the return of the steamer. We landed there and met some of the Indians, and most of the passengers spent all the time we had there in conversing with them and getting all the information we could from them in regard to their affairs. The story told by Sheldon Jackson was confirmed by the Indians as to their disagreement with the Bishop and their being in sympathy with Duncan. I didn't see Duncan at that time, and my recollection is that he was not present, but the new manager who had been placed in charge by the Bishop was there and different ones of the passengers conversed with him.

The passengers, and especially Colonel Shepard and the Senators, were very much surprised by the appearance of civilization and thrift among those Indians—we saw their houses that they lived in; they were neat cottages; the women and the children were well dressed, the houses were well kept and clean; they had substantial furniture; they had good cooking utensils; they had good beds with nice clean linen, and everything being so civilized attracted us because it was different from what we had observed among other Indians in this locality. We were shown the sawmill that they operated; we were shown a very commodious church that we were told had been built by the Indians by their own hands from lumber

(Testimony of C. H. Hanford.)

which they had manufactured in their own sawmill, and that the sawmill was also constructed by them. They had a pipe organ in that church, and we were told the ceremonies [141] were conducted by the Indians in the English language, that they were proficient in music and took great pleasure in the ceremonies of worship according to the same style that the white people do. They appeared to be capable, thrifty, well-to-do people, able to make their own way in the world just like other people, and as far as we had any knowledge on the subject they had developed entirely under the teaching and direction and management of Duncan.

Q. This was in British Columbia where they were located at that time?

A. Yes, this was in British Columbia.

Q. Prior to the time that they emigrated to Annette Island?

A. That was prior to the time that they emigrated to Annette Island, and I heard some conversation between some of the passengers—and I think Colonel Elliott was especially concerned—and the Indians and that conversation was that the Indians, rather than submit to the exactions of the Bishop, would leave there—they would abandon all these improvements they had made there and leave there if they could find a place to go to. Whether there was any specific information or welcome they would receive if they moved over on to American country I don't remember, but the feeling was that they would not submit to the Bishop and they would move away.

(Testimony of C. H. Hanford.)

Q. And this led to their moving to Annette Island?

A. That is inferential, I cannot say it is a fact.

Q. And it was after this that the Act was passed setting aside Annette Island?

A. The Act was passed in 1891; they had moved there two or three years before they passed the Act.

Q. Do you know who was in charge of the colony when they moved?

A. Only as it is a matter of general knowledge I know Father Duncan has been the head man in connection with the colony until recently. **[142]**

Q. From the earliest time on? A. Yes.

Mr. HELLENTHAL.—That is all.

Mr. REAGAN.—No questions.

WITNESS EXCUSED.

Whereupon the DEFENDANTS RESTED.

And both sides having submitted all of their evidence and having rested their case, it was agreed in open court by counsel for the respective parties, that all the foregoing affidavits and testimony heard upon this hearing might be considered by the Court as evidence upon the trial of the cause and that the cause be considered on the merits and be adjudged by the Court as upon the final trial, it being agreed by both parties that no other or further evidence was available to prove the issues on either side, so that in order to save expense to both parties the case was to be considered as being heard upon final trial and all the evidence before the Court as evidence adduced upon a trial on the merits. Whereupon the cause was submitted to the Court for determination on the merits as aforesaid. **[143]**

**Exhibit No. 1 to Affidavit of Ernest P. Walker.**

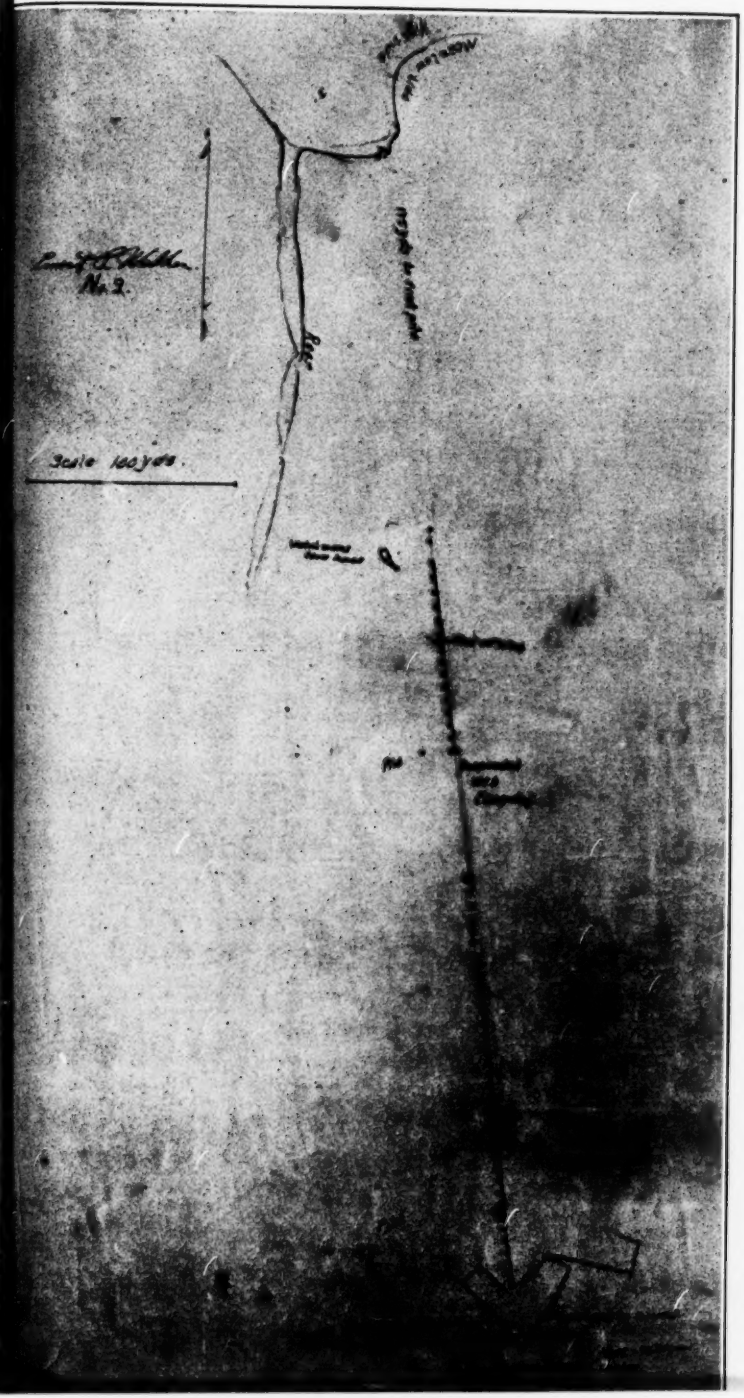



**Exhibit No. 2 to Affidavit of Ernest P. Walker.**

**Defendant's Exhibit No. 1—Chart of Clarence Strait—Revillagigedo Channel and Portland Canal, S. E. Alaska.**

[Endorsed]: Defts. Exhibit No. 1. Received in evidence Jun. 15, 1916, in Cause No. 263–KA. and 1468–A. J. W. Bell, Clerk. By John T. Reed, Deputy. [146]

MAP

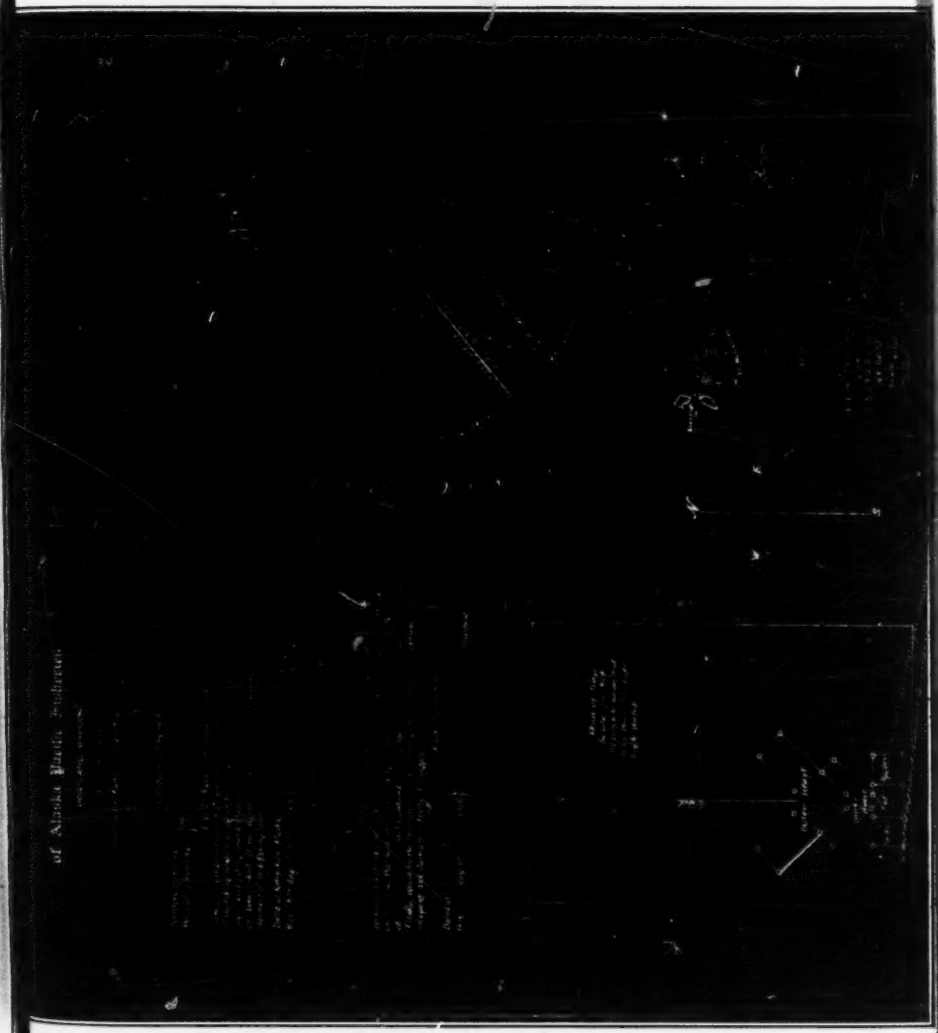
TOO

LARGE

FOR

FILMING

**Defendant's Exhibit No. 2—Map of Fish-Trap Location—Cedar Point, Annette Island, Alaska.**



[Endorsed]: Dft's Exhibit No. 2. Received in Evidence. Jun. 15, 1916. In Cause No. 263–KA, #1468–a. J. W. Bell, Clerk. By John T. Reed, Deputy. [147]

*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 263–K. A.

No. 1468–A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

**Certificate of Stenographer to Transcript of Testimony, etc.**

I hereby certify that I am the official court stenographer for the First Judicial Division, Territory of Alaska; that I reported the trial and proceedings in the above-entitled cause and that the foregoing is a full, true and correct transcript of all the testimony and evidence introduced or offered at the trial of said cause, together with all of the exhibits on which the same was heard.

Dated this 8th day of July, 1916.

L. A. GREEN. [148]

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**Defendants' Proposed Findings of Fact.**

BE IT FURTHER REMEMBERED that thereupon the defendants requested the Court to make the following Finding of Fact:

"Defendants' Proposed Finding No. 1.

The Court finds that in August of the year 1915 the defendants, pursuant to observations

previously made, went upon the present site of the defendants' fish-trap off Cedar Point, Annette Island, and made soundings and by the use of a diver made such observations as were necessary to determine the question of the feasibility of constructing a fish-trap at that place, and in this connection the court finds that as the result of such observations the defendants decided that the driving and constructing of a fish-trap upon the site now occupied by the defendants' trap was practicable and feasible."

Which said request of the defendant to find the facts as indicated in said proposed Finding of Fact No. 1 was refused by the Court, the Court refusing to so find. To which ruling and order of the Court the defendant, by its counsel then and there excepted on the ground that the facts as stated in said Finding are material and said Finding is upon a material issue in the case, and facts therein stated are in accordance with the undisputed and unquestioned testimony given by the witnesses. Which exception was then and there allowed by the Court.

The defendant further requested the Court to make and adopt as the Finding of the Court Defendants' Proposed Finding No. 2, which is in words and figures as follows:

"Defendants' Proposed Finding No. 2.

The Court finds that pursuant to and subsequent to the observations made in the month of August, 1915, referred to in Defendants' Proposed Finding No. 1, the defendants decided to

drive and construct a fish-trap upon the site now occupied by the defendants' trap and to enlarge their cannery at Chomly by installing therein such additional machinery and equipments as were necessary to pack the fish that would be caught and supplied by the fish-trap to be constructed off Cedar Point; that in the fall of 1915, and the winter of 1915–16, the Chomly cannery of the defendants was so enlarged and so supplied **[149]** with additional equipment and machinery at an expense of approximately eighteen thousand five hundred ($18,500.00) dollars.

That in the judgment of the defendants the trap to be constructed off Cedar Point would supply 600,000 fish which when canned, would fill 50,000 cases of canned salmon; that the defendants during the winter of 1915–16 contracted for the Chinese labor and purchased the tin and other supplies necessary to the canning of the said additional 50,000 cases of salmon at Chomly, at an expense to the defendants considerable in excess of twenty-five thousand ($25,000.00) dollars."

The Court denied the request of the defendant to find the facts as set forth in Defendants' Proposed Finding No. 2 and refused to adopt said Finding so requested, to which ruling and order of the Court the defendant, by its counsel, then and there excepted on the ground that said Finding and the whole thereof and each and every part thereof is

upon a material issue in the case and is in accordance with the undisputed and unquestioned testimony in the case; that the testimony relating to the facts set up in said Finding were not in any wise contradicted by any witness upon the trial. Which said exception was then and there allowed by the Court.

The defendants further requested the Court to find the facts in accordance with and adopt as a Finding of Fact the Defendants' Proposed Finding of Fact No. 3, which is in words and figures as follows:

> "Defendants' Proposed Finding No. 3.
>
> That during the winter of 1915–16 the defendants procured the necessary piles and other equipment to drive and construct a trap off Cedar Point upon the site of the defendants' present trap and on the 7th day of April in the spring of the year 1916 commenced the driving of such trap and completed the driving thereof on the 18th day of April, 1916, and that the defendants expended in this behalf a sum in excess of four thousand ($4,000.00) dollars."

Which request of the defendant to make said Proposed Finding No. 3 was denied by the Court, and the Court refused to find the facts as therein stated, to which ruling and order of the [150] Court the defendants, by counsel, then and there excepted on the ground that each and every portion of said Finding and all the facts therein stated relate to and are upon a material issue in the case and are in exact

accord with the undisputed and unquestioned testimony in the case there being no contradictory testimony upon any of the matters or things referred to in said Finding. Which said exception was then and there allowed by the Court.

The defendant further requested the Court to find the facts in accordance with Defendants' Proposed Finding No. 4, and to adopt said Finding No. 4 as the Finding of the Court, which proposed Finding of Fact No. 4 is in words and figures as follows, to wit:

> "Defendants' Proposed Finding No. 4.
>
> That all available sites for fish-traps, so far as known to the defendants, within the area from which fish can be supplied to the Chomly cannery of the defendants, have been occupied and there are no salmon to be purchased upon the market within the area from which such salmon can be taken to Chomly and canned in order to furnish the Chomly cannery with the fish necessary to fill the 50,000 cases representing the increased capacity of the cannery."

Which said request of the defendants was then and there denied by the Court, and the Court refused to find the facts as set forth in said Proposed Finding No. 4, and refused to adopt the same as the Finding of the Court. To which ruling and order of the Court the defendants, by counsel, then and there excepted, on the ground that said finding and the whole thereof and all the facts therein stated relate to material issues in the case and is in accord

with the undisputed testimony in the case, [151] there being no dispute upon any of the matters or facts in said Finding, which said exception was then and there allowed by the Court.

**Findings of Fact.**

Whereupon the Court made its Findings of Fact, which are as follows:

"Findings of Fact.

I.

That by the 15th section of the Act of Congress approved March 3, 1891, entitled 'An Act to Repeal the Timber Culture Laws' (26 Stats. L. 1101) and by the Proclamation of the President dated the 28th day of April, 1916, there was reserved from use, occupation, settlement or benefit by any except Metlakahtlans and other Indians, the following lands and waters, to wit: 'The body of lands known as Annette Islands, situated in the Alexander Archipelago, in Southeastern Alaska, on the north side of Dixon's Entrance' and 'the waters within 3000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets' and 'The bays of the said islands, rocks and islets'; and that by said Proclamation warning was 'expressly given to all unauthorized persons not to fish in or use any of said waters.' "

To which said Finding of Fact 1 as made by the Court the defendant at the time objected on the

ground that said Finding does not relate to any fact in the case whatsoever and is not a correct construction of the Proclamation issued by the President, which objection was then and there overruled by the Court, to which ruling and order of the Court the defendants, by counsel, then and there excepted, which exception was then and there allowed by the Court.

Whereupon the Court made its Finding of Fact No. 2 which is in words and figures as follows:

"II.

That defendant being a corporation not composed in whole or in part of Metlakahtlans or other Indians, did, on the 7th day of April, 1916, without permission or authority from any one, enter upon the navigable waters of the [152] United States, within 3000 feet from the shore at mean low tide of Annette Island, and within the area so reserved, and did then and there begin the erection of a fish-trap in said waters, to that end driving a large number of piles in said navigable waters for the purpose of holding the web to be suspended between said piles, and on the 18th day of April said defendant had said apparatus complete for fishing with the exception of the suspension of the web, all at a cost to defendant of $4000.00, or thereabouts.

That the said fish-trap so constructed or about to be constructed is a usual and ordinary fishing appliance such as is ordinarily used by those engaged in catching salmon in the waters of Southeastern Alaska.

That the portion of said trap nearest to the shore of Annette Island is situate 200 feet to the seaward from the line of extreme low tide, and that although the said trap is in navigable water of the United States technically speaking, it is not within any portion of the waters of the United States which are, or ever have been, used for the purposes of navigation, and is not in, and is not an obstruction to the navigable capacity of, any of the waters of the United States in the sense used in the Rivers and Harbors Act approved March 3, 1899."

Whereupon the Court made and adopted its Finding of Fact No. 3, which is in words and figures as follows:

"That prior to the issuance of the Proclamation hereinbefore mentioned T. A. Heckman, Superintendent of the defendant company, stated to P. E. Harris that he knew that a Proclamation in the premises was about to be issued by the Government."

To which said Finding of Fact No. 3 the defendants, by counsel, then and there objected on the grounds of exception hereinafter stated, and excepted on the ground that said finding is not supported by sufficient evidence and is contrary to the evidence, especially in this that it has not been proven that the President had any intention of issuing said Proclamation prior to the time that the same was actually issued, and that it is not to be assumed that anyone knew what the intention of

the President was in a matter of that character, the same being wholly within the breast of the President and such that it could not be known by anyone other than the President. Which said objection being [153] overruled, and exception duly taken at the time said Finding was made, the Court then and there allowed said exception.

Whereupon the Court made its Finding of Fact No. 4 which is in words and figures as follows, to wit:

"That on the 2d day of May, 1916, and before the fishing apparatus hereinbefore described had been made complete and effective for the catching of fish by the stringing of the web, the Assistant United States Attorney for the First Division of Alaska notified the defendant of the issuance of the said Proclamation of the President, and of its contents, and notified it to cease driving or attempting to drive any traps for the purpose of catching fish within said area, and further notified it not to commence fishing within said area."

Whereupon the Court made its Finding of Fact No. 5 which is in words and figures as follows, to wit:

"That notwithstanding said Act, Proclamation and notice, said defendant did maintain at the time of the filing of this suit, and does now maintain possession of the area enclosed by said piles and refuses to remove the same and refuses to vacate the premises, and threatens and is about to and will, if not enjoined, perfect

said trap as a fishing device and will catch therein large numbers of valuable fish and will further trespass upon said land and water so reserved as aforesaid to the irreparable injury of plaintiff, both in its Sovereign capacity and as owner and proprietor, for which plaintiff would have no plain, speedy or adequate remedy at law."

The defendants then and there objected and excepted to said Finding No. 5 as made by the Court on the ground that said Finding is not sustained by the evidence and is contrary to the evidence, more especially in this that there was no evidence to show that the plaintiff would be injured irreparably or otherwise by the maintenance of the fish-trap off Cedar Point referred to in said Finding either in its sovereignty capacity or as owner and proprietor, or in any other capacity whatsoever, which said objection being overruled, said exception was then and there allowed by the Court. [154]

**Defendant's Proposed Conclusions of Law.**

Whereupon the defendants asked the Court to conclude as a matter of law, and requested the Court to adopt as its Conclusion of Law. Defendants' Conclusion of Law No. 1, which is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 1.

The Court holds as a matter of law that in the construction of a fish-trap off Cedar Point, Annette Island, and the maintenance thereof the defendants were engaged in the exercise of their

common right of fishery, and being so engaged in the exercise of a lawful right they acquired a vested right in said fish-trap from which they could not be divested by a subsequent proclamation of the President or otherwise without compensation."

Which said request was then and there denied by the Court and the Court refused to adopt as its conclusion Conclusion of Law No. 1 proposed by the defendants, to which ruling and order of the Court the defendants, by counsel, then and there excepted on the ground that said conclusion follows from the facts found by the Court and also from the facts proven upon the trial of the cause, which said exception was then and there allowed by the Court.

The defendants further requested the Court to conclude as a matter of law and to adopt as the conclusion of law of the Court the Conclusion of Law No. 2 as proposed by the defendants, which is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 2.

The Court concludes as a matter of law that the reservation of Annette Island, as made by Act of Congress, March 3, 1891, reserved the lands to ordinary high-water mark only and did not include any of the navigable waters of the United States, and that the proclamation of the President referred to in the pleadings herein was made without authority of law in that the power to control and dispose of the territories and other property of the United States is by the Constitution vested in Congress." [155]

Which said request of the defendants was then and there denied by the Court, and the Court then and there refused to conclude as a matter of law in accordance with Conclusion of Law No. 2 requested by the defendants, and to conclude as therein stated, to which ruling and order of the Court, the defendants, by counsel, then and there excepted on the ground that said Conclusion follows as a matter of law from the facts found and from the facts proven upon the trial of the cause, which said exception was then and there allowed by the Court.

The defendant further requested the Court to conclude as a matter of law as stated in Defendants' proposed Conclusion of Law No. 3 and to adopt said Conclusion of Law No. 3 as the Conclusion of the Court, which said conclusion of law so requested is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 3.

From the facts found the Court concludes that the plaintiff is not entitled to the relief demanded or to any relief whatsoever."

Which said request of the defendants was then and there denied by the Court and the Court then and there refused to conclude as a matter of law as requested and to adopt said Conclusion of Law as the Court's conclusion of law, to which ruling and order of the Court the defendants, by counsel, then and there excepted on the ground that said Conclusion follows as a matter of law from the facts found and from the facts proven upon the trial of the cause, which said exception was then and there allowed by the Court.

**Conclusion of Law.**

Whereupon the Court made and adopted its Conclusion of [156] Law, which is in words and figures as follows:

"CONCLUSION OF LAW

I.

That plaintiff is entitled to an injunction as prayed for in the complaint."

to which ruling and order of the Court in so concluding as a matter of law, the defendants, by counsel then and there objected and excepted on the ground that upon the facts found, as well as upon the facts proven at the trial, the plaintiff is not entitled to an injunction or to any other relief whatsoever for the reasons, among others, that the original reservation of Annette Island did not include the area in which the fish-trap of the defendants was constructed; that the Proclamation of the President, referred to in the Findings was made without authority of Law and was in violation of the Constitution of the United States by which it is provided that Congress shall have control over the territory and property of the United States, and further, that the defendants, under the evidence and the facts found had a vested right to maintain the fish-trap off Cedar Point, referred to in the Findings and Pleadings herein; that they constructed the same in the exercise of the right of fishery and were rightfully maintaining the same at the time of the issuance of the President's Proclamation and at all times, and could not be deprived of its said fish-trap

or the use thereof without compensation and without due process or otherwise.

Now come the defendants and move the Court to settle and allow the above and foregoing as a true and correct Bill of Exceptions herein and to certify that the same contains all the **[157]** evidence in the case, and duly order that the same be made part of the record.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendants.

**Order Settling Bill of Exceptions.**

And now this matter coming on to be heard on the motion and request of the defendants that the above and foregoing Bill of Exceptions be allowed and settled as a true and correct Bill of Exceptions herein, and the request of the defendants that the Court certify that the same contains all the evidence in the cause and that it be made part of the record, and the Court being fully advised in the premises,

NOW ORDERS that the above and foregoing be, and the same is, settled and allowed as a true, full and correct Bill of Exceptions herein, and the Court hereby certifies that the above and foregoing Bill of Exceptions so settled and allowed by the Court contains all the evidence adduced at the trial and the whole thereof, and is a true, full and correct record of the proceedings had, and the Court further orders that the above and foregoing Bill of Exceptions hereby settled and allowed be, and the same is hereby, made a part of the record in this cause. The Court further certifies that the same was duly pre-

sented within the time allowed therefor by the court.

Done this 10th day of July, A. D. 1916.

ROBERT W. JENNINGS.

Entered Court Journal No. M, page 136. **[158]**

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*In the District Court for the Territory of Alaska, Division No. One, at Juneau.*

No. 263–K. A.

No. 1468–A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

**Injunction and Final Decree.**

This cause coming on to be heard heretofore, to wit, on the 15th day of June, 1916, by consent of the parties on the issues raised on the bill, answer and reply and on the motion theretofore filed for an injunction, and the Court having heard the evidence introduced by the respective parties, and the cause having been finally submitted to the Court on the 17th day of June, 1916, and the Court having duly considered the same and heretofore having filed its Opinion herein and having made its Findings of Fact and Conclusions of Law herein, now upon motion of the plaintiff,

IT IS HEREBY ORDERED AND DECREED that the Alaska Pacific Fisheries, a corporation, its

officers, agents, employees, and all persons acting by, through or under it or in privity with it, be and they are enjoined and restrained from doing any act or thing whatsoever in driving, constructing or completing any fish-trap or structure whatsoever on and at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets, all in Southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish-trap at or near Cedar Point, Annette Island, aforesaid, and from delivering or causing to be delivered any material whatsoever for the construction of fishing traps upon said reserve or in said waters. **[159]**

AND IT IS FURTHER ORDERED AND DECREED that the defendant, the Alaska Pacific Fisheries, be and it is hereby ordered to vacate the lands and waters mentioned in the Proclamation of the President of the United States of April 28, 1916, and to remove therefrom and to remove any and all structures therefrom heretofore erected therein by it directly or indirectly, and to refrain from in any manner trespassing in and upon said waters and said reserve.

AND IT IS ORDERED that plaintiff herein have judgment for its costs and disbursements in this suit;

and hereof let execution issue. Defendant is allowed sixty days from this date within which to file proposed Bill of Exceptions.

Done in open court this 7th day of July, 1916.

ROBERT W. JENNINGS,
District Judge.

Entered Court Journal No. M, pages 128, 129.

Filed in the District Court, District of Alaska, First Division. Jul. 7, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy. **[160]**

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*In the District Court for the Territory of Alaska, Division No. One, at Juneau.*

No. 1468–A.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through, or Under It or in Privity With It,
Defendants.

*In the United States Circuit Court of Appeals for the Ninth Circuit Holden at San Francisco.*

No. ——.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through, or Under It or in Privity With It,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Petition for an Appeal.**

The above-named Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, appellants herein, conceiving itself and themselves aggrieved by the judgment and decree rendered herein on the 7th day of July, A. D. 1916, adjudging and decreeing, among other things, that the Alaska Pacific Fisheries, a corporation, its officers, agents, employees and all persons acting by, through or under it or in privity with it, be and they are enjoined and restrained from doing any act or thing whatsoever in driving, constructing or completing any fish-trap [161] or structure whatsoever on and at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the ad-

jacent rocks and islets, all in southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish-trap at or near Cedar Point, Annette Island, aforesaid, and from delivering or causing to be delivered any material whatsoever for the construction of fishing-traps upon said reserve or in said waters. And further ordering and decreeing that the defendant, the Alaska Pacific Fisheries, be and it is hereby ordered to vacate the lands and waters mentioned in the Proclamation of the President of the United States of April 28, 1916, and to remove any and all structures therefrom prior to the date of the decree erected therein by it directly or indirectly and to refrain from in any manner trespassing in and upon said waters and said reserve, and further giving the plaintiff a judgment for costs and disbursements, which said judgment and decree was rendered in favor of the plaintiff and against the said defendants and was rendered by the Honorable Robert W. Jennings, Judge of the District Court for the District of Alaska, Division Number One, on the day above mentioned, and the above-named Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, the defendants above named, and each of said defendants, do hereby appeal from said judgment and decree to the United States Circuit **[162]** Court of Appeals for the Ninth Circuit, and that the above-named appellants,

and each of them, do further pray that it and they may be allowed an appeal from said judgment and decree and from the whole and every part thereof to the said United States Circuit Court of Appeals for the Ninth Circuit as prayed for, and the appellants and each of them further pray that it and they may be given a supersedeas herein in order that the decree complained of may not be enforced against it or them until the errors herein complained of can be reviewed by the said United States Circuit Court of Appeals for the Ninth Circuit.

HELLENTHAL & HELLENTHAL.
C. H. HANFORD.
JAMES M. SHOUP.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1916. J. W. Bell. Clerk. By ————, Deputy. **[163]**

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*In the District Court for the Territory of Alaska, Division No. One, at Juneau.*

No. 1468–A.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,
Defendants.

**Application for Supersedeas.**

*In the United States Circuit Court of Appeals for the Ninth Circuit Holden at San Francisco.*

No. ——.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Come now the defendants and appellants herein, a petition for an appeal having been filed asking the Court to permit an appeal herein to the Circuit Court of Appeals for the Ninth Circuit holden at San Francisco, and apply to the Court for a Supersedeas herein in order that the judgment and decree heretofore rendered herein may not be enforced and may be stayed during the pendency of the appeal and in this connection the defendants and appellants respectfully direct the Court's attention to the testimony adduced upon the trial by which it is conclusively shown that the defendants and appellants would be damaged in a sum not less than fifty thousand dollars if they **[164]** were prevented from operating and fishing the fish-trap at Cedar Point in controversy in this case during the season of 1916, while the plaintiff and appellee would suffer no dam-

age whatsoever because of the operation of said fish-trap by the defendants and appellants during the season of 1916, which said fishing season has just commenced.

And the Court's attention is directed to the further fact that since the decree contains a mandatory injunction directing the defendants and appellants to remove the fish-trap at Cedar Point, the execution of the decree would place the defendants where they could not be restored to their rights in the event of a reversal by the Circuit Court of Appeals.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendants and Appellants.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1916. J. W. Bell, Clerk. By ————, Deputy. **[165]**

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*In the District Court for the Territory of Alaska, Division No. One, at Juneau.*

No. 1468–A.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,
Defendants.

*In the United States Circuit Court of Appeals for the Ninth Circuit Holden at San Francisco.*

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It, or in Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Assignment of Errors.**

Come now the Alaska Pacific Fisheries, a corporaiton, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, the appellants herein, and assign the following errors made by the trial court as the errors upon which the said appellants will rely for a reversal of the judgment and decree rendered herein:

FIRST ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 1 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 1, which said proposed **[166]** Finding of Fact No. 1 is in words and figures as follows:

"Defendants' Proposed Finding No. 1.

The Court finds that in August of the year 1915, the defendants, pursuant to observations

previously made, went upon the present site of the defendants' fish-trap off Cedar Point, Annette Island, and made soundings and by the use of a diver made such observations as were necessary to determine the question of the feasibility of constructing a fish-trap at that place, and in this connection the Court finds that as the result of such observations the defendants decided that the driving and constructing of a fish-trap upon the site now occupied by the defendants' trap was practicable and feasible."

SECOND ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 2 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 2, which said proposed Finding of Fact No. 2 is in words and figures as follows:

"Defendants' Proposed Finding No. 2.

The Court finds that pursuant to and subsequent to the observations made in the month of August, 1915, referred to in Defendants' Proposed Finding No. 1, the defendants decided to drive and construct a fish-trap upon the site now occupied by the defendants' trap and to enlarge their cannery at Chomly by installing therein such additional machinery and equipments as were necessary to pack the fish that would be caught and supplied by the fish-trap to be constructed off Cedar Point; that in the fall of 1915,

and the winter of 1915–16, the Chomly cannery of the defendants was so enlarged and so supplied with additional equipment and machinery at an expense of approximately eighteen thousand five hundred ($18,500.00) dollars.

That in the judgment of the defendants the trap to be constructed off Cedar Point would supply 600,000 fish which, when canned, would fill 50,000 cases of canned salmon; that the defendants during the winter of 1915–16 contracted for the Chinese labor and purchased the tin and other supplies necessary to the canning of the said additional 50,000 cases of salmon at Chomly, at an expense to the defendants considerable in excess of twenty-five thousand ($25,000.00) dollars." **[167]**

THIRD ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 3 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 3, which said proposed Finding of Fact No. 3 is in words and figures as follows:

"Defendants' Proposed Finding No. 3.

That during the winter of 1915–16 the defendants procured the necessary piles and other equipment to drive and construct a trap off Cedar Point upon the site of the defendants' present trap and on the 7th day of April in the spring of the year 1916 commenced the driving

of such trap and completed the driving thereof on the 18th day of April, 1916, and that the defendants expended in this behalf a sum in excess of four thousand ($4,000.00) dollars."

FOURTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 4 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 4, which said proposed Finding of Fact No. 4 is in words and figures as follows:

"Defendants' Proposed Finding No. 4.

That all available sites for fish-traps, so far as known to the defendants, within the area from which fish can be supplied to the Chomly cannery of the defendants, have been occupied and there are no salmon to be purchased upon the market within the area from which such salmon can be taken to Chomly and canned in order to furnish the Chomly cannery with the fish necessary to fill the 50,000 cases representing the increased capacity of the cannery."

FIFTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 1 and in finding the facts as in said Finding No. 1 [168] stated, which Finding No. 1 as made by the Court is in words and figures as follows:

"That by the 15th section of the Act of Congress approved March 3, 1891, entitled 'An Act to Repeal the Timber Culture Laws' (26 Stats. L. 1101) and by the Proclamation of the President dated the 28th day of April, 1916, there was reserved from use, occupation, settlement or benefit by any except Metlakahtlans and other Indians, the following lands and waters, to wit: 'The body of lands known as Annette Islands, situate in the Alexander Archipelago, in Southeastern Alaska, on the North side of Dixon's Entrance' and 'the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets' and 'the bays of the said islands, rocks and islets'; and that by said Proclamation warning was 'expressly given to all unauthorized persons not to fish in or use any of said waters.' "

SIXTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 3 and in finding the facts as in said Finding No. 3 stated, which Finding No. 3 as made by the Court is in words and figures as follows:

"That prior to the issuance of the Proclamation hereinbefore mentioned T. A. Heckman, Superintendent of the defendant company, stated to P. E. Harris that he knew that a Proc-

lamation in the premises was about to be issued by the Government."

SEVENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 5 and in finding the facts as in said Finding No. 5 stated, which Finding No. 5 as made by the Court is in words and figures as follows:

"That notwithstanding said Act, Proclamation and notice, said defendant did maintain at the time of the filing of this suit, and does now maintain possession of the area enclosed by said piles and refuses to remove the same and refuses to vacate the premises, and threatens and is about to and will, if not enjoined, perfect said trap as a fishing device and will catch [169] therein large numbers of valuable fish and will further trespass upon said land and water so reserved as aforesaid to the irreparable injury of plaintiff, both in its Sovereign capacity and as owner and proprietor, for which plaintiff would have no plain, speedy or adequate remedy at law."

EIGHTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 1 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 1, is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 1.

The Court holds as a matter of law that in the construction of a fish-trap off Cedar Point, Annette Island, and the maintenance thereof the defendants were engaged in the exercise of their common right of fishery, and being so engaged in the exercise of a lawful right they acquired a vested right in said fish-trap from which they could not be divested by a subsequent proclamation of the President or otherwise without compensation."

NINTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 2 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 2 is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 2.

The Court concludes as a matter of law that the reservation of Annette Island as made by Act of Congress March 3, 1891, reserved the lands to ordinary high-water mark only and did not include any of the navigable waters of the United States, and that the proclamation of the President referred to in the pleadings herein was made without authority of law in that the power to control and dispose of the territories

and other property of the United States is by the Constitution vested in Congress." [170]

TENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 3 requested by the Defendants, which said Defendants' Proposed Conclusion of Law No. 3 is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 3.

From the facts found the Court concludes that the plaintiff is not entitled to the relief demanded or to any relief whatsoever."

ELEVENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in concluding as a matter of law and making and entering its Conclusion of Law, which is in words and figures as follows:

"That plaintiff is entitled to an injunction as prayed for in the complaint."

TWELFTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in entering its judgment and decree herein, which is in words and figures as follows:

*"In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 1468–A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,

Defendants.

INJUNCTION AND FINAL DECREE.

This cause coming on to be heard heretofore, to wit, on the 15th day of June, 1916, by consent of the parties on the [171] issues raised on the bill, answer and reply and on the motion theretofore filed for an injunction, and the Court having heard the evidence introduced by the respective parties, and the cause having been finally submitted to the Court on the 17th day of June, 1916, and the Court having duly considered the same and heretofore having filed its Opinion herein and having made its Findings of Fact and Conclusions of Law herein, now upon motion of the plaintiff.

IT IS HEREBY ORDERED AND DECREED that the Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, be and they are enjoined and restrained from doing any act or thing whatsoever in driving, constructing or completing any fish-trap or structure whatsoever on and

at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets, all in Southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish-trap at or near Cedar Point, Annette Island, aforesaid, and from delivering or causing to be delivered any material whatsoever for the construction of fishing traps upon said reserve or in said waters.

AND IT IS FURTHER ORDERED AND DECREED that the defendant, the Alaska Pacific Fisheries, be and it is hereby ordered to vacate the lands and waters mentioned in the Proclamation of the President of the United States of April 28, 1916, and to remove therefrom and to remove any and all structures therefrom heretofore erected therein by it directly or indirectly, and to refrain from in any manner trespassing in and upon said waters and said reserve.

AND IT IS ORDERED that plaintiff herein have judgment for its costs and disbursements in this suit; and hereof let execution issue. Defendant is allowed 60 days from this date within which to file proposed Bill of Exceptions.

Done in open court this 7th day of July, 1916.

ROBERT W. JENNINGS,
District Judge."

HELLENTHAL & HELLENTHAL,
C. H. HANFORD,
JAMES M. SHOUP,
Attorneys for Appellants.

Due service by copy admitted this 10th day of July, 1916.

JAMES A SMISER,
Attorneys for Appellee.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1916. J. W. Bell, Clerk. By ————, Deputy. [172]

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*In the District Court for the District of Alaska, Division No. One, at Juneau.*

No. 243–K, A.

No. 1468–A.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Defendants,

**Order Allowing Appeal, etc.**

Now, on this 10th day of July, came on to be heard the petition of the defendants in the above-entitled cause for an order allowing their appeal herein as

prayed for in their petition filed this day, and that a supersedeas of the decree heretofore entered herein be allowed pending said appeal, and fixing the amount of bond in the premises; and the Court being fully advised doth allow said appeal and doth grant said request for a supersedeas so far as all that part of the decree is concerned which awards costs and disbursements and orders the defendants to remove any and all structures from the disputed area; and doth deny said request for a supersedseas so far as the remainder of the decree is concerned. And the amount of bond on appeal is hereby fixed at $250.00, same to act as a supersedeas as hereinbefore granted.

Dated this 10th day of July, 1916.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal, No. M, page 134.

The defendants except to the ruling and order of the Court in denying the supersedeas.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1916. J. W. Bell, Clerk. By ————, Deputy. **[173]**

*In the District Court for the District of Alaska, Division No. One, at Juneau.*

*In the United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.*

No. 263–K. A.

No. 1468–A.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting By, Through or Under It or in Privity with It,
Defendants,

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting By, Through or Under It or in Privity with It,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS: That we, the Alaska Pacific Fisheries, a Corporation, appellant herein, and B. M. Behrends, surety, all residents of the Territory of Alaska, are held firmly bound unto the above-named United States

of America, appellee, in the sum of Two Hundred *Fifty, to* be paid to the said appellee for the payment of which well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, administrators and assigns and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of July, in the year of our Lord, one thousand nine hundred and sixteen. [174]

Whereas the above-named Alaska Pacific Fisheries, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree rendered in the above-entitled suit by Robert W. Jennings, Judge of the District Court for the Territory of Alaska,

Now, therefore, the condition of this obligation is such that if the above-named Alaska Pacific Fisheries shall prosecute its said appeal to effect and answer all costs, if they fail to make said appeal good then this obligation shall be void; otherwise the same shall be in full force and effect.

ALASKA PACIFIC FISHERIES.
By S. HELLENTHAL, [Seal]
Its Attorney.
B. M. BEHRENDS, [Seal]
Surety.

Approved.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1916. J. W. Bell, Clerk. By ————, Deputy. [175]

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*In the District Court for the District of Alaska, Division No. One, at Juneau.*

*In the United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.*

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees and All Persons Acting By, Through or Under It or in Privity With It,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Citation on Appeal.**

THE UNITED STATES OF AMERICA,—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty (30) days from and after this date, pursuant to an appeal*ed* filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, at Juneau, in the above-entitled cause, wherein the Alaska Pacific Fisheries, a corporation, the appellant herein, was the defendant, and the United States of America, the appellee herein, was

the plaintiff, to show cause, if any there be, why the judgment and decree entered in said cause of the United States of America vs. Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, and referred to in the petition for an appeal filed in said [176] cause, which said appeal was by order of the Court allowed as prayed for, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States this 10th day of July, in the year of our Lord one thousand nine hundred and sixteen.

ROBERT W. JENNINGS,
Judge of the District Court for the Territory of Alaska, Division Number One.

Copy of the foregoing received and service admitted this 10th day of July, 1916.

[Seal] JAMES A. SMISER,
U. S. Atty.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1916. J. W. Bell, Clerk. By ————, Deputy. [177]

*In the District Court for the Territory of Alaska, Division No. One, at Juneau.*

*In the United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.*

No. 263–K.A.

No. 1468–A.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and all Persons Acting by, Through or Under It or in Privity With It,
Defendants.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and all Persons Acting by, Through or Under It or in Privity With It,
Appellants.

vs.

THE UNITED STATES OF AMERICA,
Appellee.

**Praecipe for Transcript of Record.**

To the Clerk of the District Court for the Territory of Alaska, Division Number One.

You will kindly prepare and transmit to the Circuit Court of Appeals for the Ninth Circuit in connection with the appeal herein copies of the follow-

ing papers and documents herein: Complaint, Answer, Reply, Opinion, Bill of Exceptions, Decree, Petition for an Appeal, Application for Supersedeas, Assignment of Errors, Order Allowing Appeal, Bond on Appeal, Original Citation on Appeal, together with acceptance of service thereon, and this Praecipe.

HELLENTHAL & HELLENTHAL,
Attorneys for Appellants.

Filed in the District Court, District of Alaska, First Division. Jul. 20, 1916. J. W. Bell, Clerk. By ————, Deputy. [178]

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*In the District Court for the District of Alaska, Division No. 1, at Juneau.*

United States of America,
District of Alaska,
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 178 pages of typewritten matter, numbered from 1 to 178, both inclusive, constitute a full, true and complete copy, and the whole thereof, prepared in accordance with the praecipe of defendant and plaintiff in error, on file in my office and made a part hereof, in Cause No. 263–K.A. and No. 1468–A, wherein the United States of America is plaintiff and defendant in error, and Alaska Pacific Fisheries, a corporation, is defendant and plaintiff in error.

I further certify that the said record is by virtue of an appeal and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Eighty-one and 45/100 Dollars ($81.45), has been paid to me by plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 24th day of July, 1916.

[Seal] J. W. BELL,
Clerk.

By ————————,
Deputy.

[Endorsed]: No. 2828. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Pacific Fisheries, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed August 7, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed Sept. 23, 1916. F. D. Monckton, Clerk.

No. 2828

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

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ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

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Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

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## PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, etc.,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Order of Submission.**

ORDERED, appeal in the above-entitled cause argued by Messrs. J. A. Hellenthal and C. H. Hanford, counsel for the appellant, and by Mr. Assistant United States Attorney M. A. Thomas, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for the appellee to file a further brief if desired, and with leave to counsel for the appellant to reply thereto within thirty (30) days thereafter.

Upon motion of Mr. C. H. Hanford, counsel for the appellant, Mr. Assistant United States Attorney

M. A. Thomas, counsel for the appellee, consenting thereto, FURTHER ORDERED, petition of appellant for reinstatement of supersedeas submitted to the Court for consideration and decision, with leave to counsel for the appellee to file counter-affidavits in opposition to said petition, if desired, within ten (10) days from date.

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At a stated term, to wit, the October Term, A. D. 1916, of the United States Circuit of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the nineteenth day of March, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable WILLIAM B. GILBERT, WILLIAM W. MORROW and WILLIAM H. HUNT, Circuit Judges, before whom the cases were heard, ORDERED, that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed and re-

corded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * Alaska Pacific Fisheries, etc., Appellant, vs. The United States of America, Appellee, No. 2828.

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*In the United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Opinion U. S. Circuit Court of Appeals.**

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

C. H. HANFORD and HELLENTHAL & HELLENTHAL, for Appellants.

JOHN W. PRESTON and JAMES A. SMISER, United States Attorneys, and M. A. THOMAS, Asst. U. S. Attorney, for Appellee.

Before GILBERT, MORROW and HUNT, Circuit Judges.

MORROW, Circuit Judge.

This is an appeal from a final decree entered by

the District Court of Alaska, in favor of the United States, enjoining the appellants from driving, constructing or completing any fish-trap or structure whatsoever on and at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3,000 feet from the shore at mean low tide of Annette Island, in Southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish-trap at or near Cedar Point, Annette Island, and from delivering or causing to be delivered any material whatsoever for the construction of fishing-traps upon such reserve or in said waters. The decree further ordered that the defendant Alaska Pacific Fisheries vacate the lands and waters mentioned in the proclamation of the President of the United States of April 28, 1916, and to remove therefrom and to remove any and all structures therefrom heretofore erected therein by it directly or indirectly, and to refrain from in any manner trespassing in and upon said waters and said reserve.

By Sec. 15 of the Act of Congress of March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes" (26 Stat. 1095, 1101), a body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, was set apart as a reservation for the use of the Metlakahtla Indians and those people known as Metlakahtlans who had

recently emigrated from British Columbia to Alaska, and such other Alaskan natives as might join them, to be held and used by them in common, under such rules and regulations and subject to such restrictions as might be prescribed from time to time by the Secretary of the Interior.

By the proclamation of the President, dated the 28th day of April, 1916 (39 Stat., Part 2, Proclamations of the President, 57), it was recited that the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, had decided to place in operation a cannery on Annette Islands. It was therefore necessary that the fishing in the waters contiguous to the therein-described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery. It was accordingly proclaimed by the President that the waters within 3,000 feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island and adjacent rocks and islets located within the area segregated by a broken line upon a diagram attached to and made a part of the proclamation, and also the bays of said islands, rocks and islets, were thereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as had joined them or might join them in residence on these islands used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

By Sec. 10 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1121, 1151), it was provided:

"That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or *other structures* in any port, roadstead, haven, harbor, canal, navigable river, or *other water of the United States, outside established harbor lines,* or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

On the 7th day of April, 1916, the appellant Alaska Pacific Fisheries, a corporation, by its agents and employees, entered upon the navigable waters adjacent to Annette Island, less than 2,000 feet south of a point of land designated as Cedar Point, and within 3,000 feet from the shore of the island at mean low tide, and began the erection of a fish-trap in said waters by driving a large number of piles in such navigable waters for the purpose of holding the web to be suspended between the piles; and upon the 8th

day of April, the appellant named had this apparatus completed for fishing, with the exception of the suspension of the web between the piles. The fish-trap so constructed and being constructed was the usual and ordinary fishing apparatus ordinarily used by those engaged in the catching of salmon in the waters of Southeastern Alaska. The portion of the trap nearest the shore of Annette Island was situate 200 feet to the seaward from the line of extreme low tide, and was within the navigable waters surrounding Annette Island. The entire trap is embraced within the area referred to in the President's proclamation of April 28, 1916, and, as no harbor lines have ever been established at Annette Island, the structure is in waters of the United States outside of any established harbor lines, and has been erected upon plans not submitted to or recommended by the Chief of Engineers of the United States and without any authority from the Secretary of War.

On the 2d day of May, 1916, the appellants were served with a notice, by the Assistant United States Attorney for the District of Alaska, that, by virtue of the proclamation, three thousand feet of waters contiguous to Annette Island, Alaska, had been set aside for the exclusive rights of the Metlakahtlans; and the appellants were warned against trespassing on the said reserved area of waters and to cease driving or attempting to drive any traps for the purpose of catching fish within the said area and to cease fishing any traps within the said area. To this notice the attorney of the appellant corporation replied that the corporation denied that the President had

lawful power to extend a reservation beyond the boundaries prescribed by an Act of Congress or to include public navigable water, and suggested that, as the validity of the rights asserted would have to be adjudicated, the most expeditious manner of making an issue would be to initiate judicial proceedings. The present suit was thereupon commenced by the United States, praying for an injunction restraining the appellants from continuing the construction of the trap mentioned in the complaint, or from fishing same, or interfering in any way whatsoever with the free and uninterrupted passage of fish in and through the waters described in said proclamation or from in any way trespassing upon the lands described in said Act of Congress, or the waters adjacent thereto or upon the littoral rights of the said natives. The complaint also prayed for a mandatory injunction compelling the defendants to vacate the lands and waters and to remove therefrom and to remove said structures therefrom.

It is alleged in the complaint and admitted in the answer that the United States, by virtue of its sovereignty, is the owner and seized in fee of the body of land known as Annette Island and the waters adjacent thereto, and that prior to March 3, 1891, said island was occupied by an association of Indians known as the Metlakahtlans or Metlakahtla Indians. The date of this occupation appears to have been in 1886, when the Indians came to the island from British Columbia under the leadership of one Father Duncan.

The complaint recited Sec. 15 of the Act of Con-

gress of March 3, 1891, setting aside and apart said Annette Island and islands adjacent thereto as a reservation for the use of the said Indians and such other Alaskan natives as might join them, and it is alleged that by virtue of that act the said Annette Islands, the uplands together with the shore lands, became and were at all times reserved to the exclusive use and benefit and occupancy of the Indians mentioned in the act, with the exclusive right to the use of the shore or tide-lands at all places on said islands to deep water, free from obstructions erected or maintained by others; and to the right of fishing in the waters surrounding said islands exclusively. That ever since the passage of the act, the Indians mentioned in the act have been in the sole, exclusive, quiet and peaceable possession of said islands and the waters surrounding the same and adjacent thereto; that they have improved said lands, built a town thereon known as the village of Metlakahtla, built and maintained a school, a water system, a fish cannery and saw mill, have governed themselves and by ordinances provided for fire and health protection, and have been in the exclusive possession of the fisheries in the waters surrounding said islands, and, in addition thereto, have built and erected one of the largest churches in the Territory of Alaska. That in the year 1914, by ordinance of the Council of said Annette Islands, existing under the regulations of the Secretary of the Interior as provided by the act of Congress, and with the approval of said Secretary, permits were granted to natives among the class mentioned in the act of Congress, to drive and

maintain fishing-traps in the waters surrounding said island, and like permits were granted in the year 1915. That at no time since the passage of the act of Congress of March 3, 1891, has there been any interference by any person not mentioned in the act with the possession and rights of the persons mentioned in the act, until the interference by the appellant corporation in April, 1916, in the building of the fish-trap on the western shore and shore-line of Annette Island, heretofore mentioned. The complaint sets up the President's proclamation of April 28, 1916, reserving for the benefit of the Metlakahtla Indians and such other Alaskan natives as might join them the waters surrounding Annette Island within three thousand feet from the shore of the island, for fishing purposes, and the act of March 3, 1899, prohibiting the creation of any obstruction to the navigable capacity of any of the waters of the United States not affirmatively authorized by Congress, and making it unlawful to build or commence to build any structure in any of the waters of the United States outside established harbor lines except upon plans recommended by the Chief of Engineers and authorized by the Secretary of War. The particulars concerning the intrusion of the appellants into the waters reserved by the President's proclamation are set out in detail, together with the notices served upon the appellants, warning the appellant corporation against such intrusion.

The complaint prayed for an injunction restraining the appellants from continuing the construction of the fish-trap mentioned in the complaint, and

from fishing same, or interfering with the free and uninterrupted passage of fish in and through the waters described in the President's proclamation, and from trespassing upon the lands described in the act of Congress or the waters adjacent thereto or upon the littoral rights of the natives. The complaint also prayed for a mandatory injunction compelling the appellants to vacate said lands and waters and to remove therefrom.

The appellants in their answer admit that subsequent to the passage of the act of Congress referred to in the complaint Annette Island has been occupied by the Metlakahtla Indians or the Metlakahtlans referred to in the act, but the appellants deny that the shore-lines or any part of said shore-lines—that is to say, the tide-lands lying between low water and the ordinary line of high tide—have been reserved by virtue of said act of Congress, or have been occupied by said Indians, either in whole or in part, and the appellants deny that the right of fishing in said waters surrounding the island was by virtue of said act of Congress or otherwise reserved to the use of the said Metlakahtla Indians or others referred to in the said act or at all. The appellants deny that the said Indians, Metlakahtlans or others referred to in said act, or any other person or persons whatsoever, have had, by reason of said act or otherwise, the exclusive right to use, occupy or control the tide-lands lying between low water mark and the line of ordinary high tide along the shore of Annette Island, or any part of said tide-lands; allege that the President's proclamation was issued

without authority of law and is void and of no effect. The answer sets up other matters relating to the occupation of the islands by the Metlakahtlans and the circumstances connected with its construction of the fish-trap mentioned in the complaint. Upon these matters of minor importance the reply of the United States takes issue; but the dominant question, as presented by the complaint and answer, is the right of the appellants to enter upon the waters mentioned in the complaint and erect the fish-trap at the place designated.

The errors assigned relate to the refusal of the Court to make and adopt certain findings of facts as requested by the appellants, the making and adopting by the Court of certain other findings of facts, the refusal of the Court to adopt certain conclusions of law proposed by the appellants, and the action of the Court in adopting certain other conclusions of law, resulting in the final decree in favor of the United States. The main questions at issue, as presented by the assignments of error, are stated in the following conclusions of law proposed by the appellants and refused by the Court, to which refusal the appellants took exceptions:

(1) "In the construction of a fish-trap off Cedar Point, Annette Island, and the maintenance thereof the defendants were engaged in the exercise of their common right of fishery, and being so engaged in the exercise of a lawful right they acquired a vested right in said fish-trap from which they could not be divested by

a subsequent proclamation of the President or otherwise without compensation."

(2) "The reservation of Annette Island, as made by Act of Congress, March 3, 1891, reserved the lands to ordinary high-water mark only and did not include any of the navigable waters of the United States, and that the proclamation of the President referred to in the pleadings herein was made without authority of law in that the power to control and dispose of the territories and other property of the United States is by the Constitution vested in Congress."

Referring to the last proposition first, it may be conceded, without so deciding, that the reservation of Annette Island as made by the act of Congress of March 3, 1891, reserved the lands of the island to ordinary high-water mark only and did not include the shore between the high and low water marks, nor any navigable waters surrounding the island; but it does not follow that the proclamation of the President of April 28, 1916, was made without authority. It may be conceded further that the power to control and dispose of the territories and other property of the United States is by the constitution vested in Congress; but it does not follow that the President may not reserve public lands and adjacent waters for useful purposes without being authorized so to do by express statute.

In United States v. Midwest Oil Co., 236 U. S. 459, 471, the Supreme Court had before it a reservation made by the President of public lands containing

petroleum or other mineral oils, chiefly valuable therefor, which prior thereto had been declared by Congress to be free and open to occupation, exploration and purchase by citizens of the United States. The act of Congress was passed February 11, 1897 (29 Stat. 526). The President withdrew and reserved certain of these lands by an order dated September 27, 1909. The Court in sustaining the right of the President to make such reservation without statutory authority, refers to the fact that prior to 1910 at least 252 reservations for useful, though non-statutory purposes had been made by the President, and cites Grisar v. McDowell, 6 Wall. 364, 381, where it was said that "from an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses." The Court continues:

> "But notwithstanding this decision and the continuity of this practice, the absence of express statutory authority was the occasion of doubt being expressed as to the power of the President to make these orders. The matter was therefore several times referred to the law officers of the Government for an opinion on the subject. One of them stated (1889) (19 Op. 370) that the validity of such orders rested on 'a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, portions of the public

domain.' Another reported that 'the power of the President was recognized by Congress and that such recognition was equivalent to a grant.' (17 Op. 163) (1881). Again when the claim was made that the power to withdraw did not extend to mineral land, the Attorney General gave the opinion that the power 'must be regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated.' (17 Op. 232 (1881).

"Similar views were expressed by officers in the Land Department. Indeed, one of the strongest assertions of the existence of the power is the frequently quoted statement of Secretary Teller made in 1881:

" 'That the power resides in the Executive from an early period in the history of the country to make reservations has never been denied either legislatively or judicially, but on the contrary has been recognized. It constitutes in fact a part of the Land Office Law, exists *ex necessitate rei,* is indispensable to the public weal and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled ever to be disputed.' 1 L. D., 338 (1881–3.)"

The Court says further:

"It may be argued that while these facts and rulings prove a usage they do not establish its validity. But," says the Court, "*government is a practical affair intended for practical men.*"

And upon the practice of the Government officers with respect to such practical affairs, the Court sustained the right of the President to make such a reservation without statutory authority; citing a number of cases in support of such action.

In the present case there is no question about the President's reservation of Annette Island being in conflict with the preceding act of Congress. It is not; but on the contrary the reservation is in conformity with the purpose of the act and was designed to carry that purpose into practical effect. Sec. 15 of the Act of March 3, 1891, reserved that island for the use of the Metlakahtla Indians and such other Alaskan natives as might join them. What use? These Indians are not agriculturalists, and, if they were, the island is practically worthless for that purpose since the island has very little agricultural land upon it. These Indians are fishermen and hunters and they obtain their living by fishing and hunting, mainly by fishing in waters such as surround Annette Island. The island was then reserved for the habitation of these Indians and for their use in obtaining their food supply from the waters immediately surrounding the island. Now if, as the Supreme Court says in the Midwest Oil case, the "Government is a practical affair intended for practical men," we can think of nothing more practical, under all the circumstances, than the reservation by the President of the waters immediately surrounding Annette Island for the use and benefit of these Indians; and this was undoubtedly the prac-

tical purpose Congress had in view when it made the original reservation.

But did the President's authority to reserve lands belonging to the public domain give him authority to reserve the waters surrounding Annette Island "within three thousand feet from the shore at mean low tide?" Alaska is a territory of the United States. Annette Island is in that territory. The United States is, therefore, the owner in fee of the island and its shores; that is to say, it is the owner of the upland on the island and all the land between the high and low water marks. It is also the owner of the soil under all the navigable waters surrounding the island, and is sovereign and has dominion over all.

In Shively v. Bowlby, 152 U. S. 1, 47, 57, the Supreme Court, considering the diversity of view disclosed by the discussion as to the scope and effect of the previous decisions of the Court upon the subject of public and private rights in lands below high-water mark of navigable waters, deemed it to be a fit occasion for a full review of those decisions and the consideration of other authorities upon the subject. The Court then proceeds to review the leading decisions and authorities and reaches certain conclusions; among others, that notwithstanding the dicta contained in some of the opinions of the court to the effect that Congress had no power to grant any land below high-water mark of navigable waters in a Territory of the United States, it was not strictly true, and, after a review of the authorities, concludes that—

"By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition. (Citing cases.)

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory."

Then, as a final summary of its conclusions, the Court says:

"Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation and *fishery*. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

"At common law, the title and the dominion

in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

"Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory. * * *

"The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, *may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters.* But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union."

These conclusions were reached by the Court in determining conflicting rights of private parties to certain shore lands fronting on the Columbia River at the city of Astoria; one party deriving title from a donation claim acquired under an act of Congress while Oregon was a territory, and the other party claiming under a subsequent grant from the State of Oregon, pursuant to its statutes as a State.

In the present case we are not dealing with the rights of grantees under conflicting grants, but with the scope and purpose of a reservation by the United States.

It may be said, therefore, that the law declared in this case is *dictum* as applied to the question involved in the present case; but the Court, in reaching the conclusions it did, found it necessary to review the whole question of public and private rights in the lands under the navigable waters of the United States and cites authorities in support of all of its conclusions. The statement of the law by the Court is, therefore, controlling, and we must hold that the reservation of Annette Island by the act of Congress, and of its surrounding waters by the President's proclamation, is fully sustained.

It may be objected further that the law as stated by the Supreme Court is not authority for the reservation of the waters adjacent to Annette Island for the reason that the reservation is for the benefit of the Metlakahtla Indians and not for the whole people. We think that such a reservation is for the benefit of the whole people. It protects the food supply of a whole tribe of Indians and other native

Indians that may join them and provides the means for their self-support. In guarding against the possibility of these Indians becoming a public charge, the measure is clearly a public concern and for the benefit of the whole people.

But, as we are not limited in our conclusions to the issues thus presented, we return to the original question, namely, Have the appellants the right to enter upon the waters mentioned in the complaint and erect a fish-trap at the place designated? The Metlakahtla Indians are not parties to this action and their rights under the reservation are not involved in this controversy. The appellants have no title to the soil under the waters where they have driven the piles for the fish-trap which is the subject of this complaint, nor have the plans for the structure been approved by the Chief of Engineers, nor the structure itself authorized by the Secretary of War. The United States, the complainant in this case, is the owner of the soil. The appellants, as defendants, are mere trespassers.

The law applicable to such a case was stated by the Supreme Court in Weber v. Harbor Commissioners, 18 Wall. 57. In that case the State of California had reserved certain lands in the navigable waters of the Bay of San Francisco for the construction of wharves. The lands were situated nearly half a mile from what was the shore of the Bay of San Francisco at the time California was admitted into the Union, and over which the water at the lowest tide then flowed at a depth sufficient to float vessels of ordinary size. Weber had a wharf erected in

these waters which he claimed to own under a title derived from the city of San Francisco and by possession and prescription covering a period of thirteen years. The Court, referring to the proposition that in several of the states, by general legislation or immemorial usage, the proprietor whose land is bounded by the shore of the sea, or of an arm of the sea, possesses the right to erect a wharf or pier in front of his land, extending into the waters to the point where they are navigable, said:

> "In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those States where the common law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tide-waters is, in England, in the king, and, in this country, in the State. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a *purpresture*, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

On the southeast coast of Massachusetts is a body of water called Buzzard's Bay, an inlet of the Atlantic Ocean. It is about thirty miles in length and five to ten miles in width. Over the waters of this bay the commonwealth of Massachusetts has assumed the jurisdiction which the United States has over the waters of Alaska, and has by statute made certain reservations and regulations governing

the fishing industry carried on in the waters of the bay. Among other regulations, it has provided against the use of the purse seine in taking fish anywhere in the waters of the bay. In Manchester v. Massachusetts, 139 U. S. 240, the Supreme Court of the United States had before it the question whether these regulations would prevail to exclude the defendant from taking fish in Buzzard's Bay by using a purse seine. The defendant was a citizen of Rhode Island and was engaged in fishing for menhaden with a steamer under a license issued by the United States. In the act of fishing, the defendant used no fixed apparatus and the bottom of the sea was not encroached upon or disturbed. This latter fact was considered an important feature of the defense, and in this particular that case is distinguished from the present one and was a much stronger case for the defendant. Another defense was that the act complained of was committed upon the high seas, the common property of the people, and it was contended there, as it is here, that proprietary rights could not be reserved in such waters; that the characteristic feature of the proprietary title in the seashore was its limitation to low-water mark. The Supreme Judicial Court of Massachusetts held the statute of Massachusetts under which the defendant was being prosecuted constitutional and valid. Commonwealth v. Manchester, 152 Mass. 230. The Supreme Court of the United States upon writ of error affirmed the judgment of the Massachusetts court, and, in doing so, it said:

"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit. Gould on Waters, part 1, c. 1, §§ 1–17, and notes; Neill v. Duke of Devonshire, 8 App. Cas. 135; Gammell v. Commissioners, 3 Macq. 419; Mowat v. McFee, 5 Sup. Ct. of Canada, 66; The Queen v. Cubitt, 22 Q. B. D. 622; St. 46 & 47 Vict. c. 22."

In concluding the opinion, the Court said:

"We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State."

The jurisdiction exercised by the commonwealth of Massachusetts over the waters of Buzzard's Bay is the jurisdiction which the United States has over the waters of Alaska; and, under the law as declared in the case just cited and in Weber v. Harbor Commissioners, *supra,* the appellants have acquired no rights, vested or otherwise, to construct or maintain a fish-trap within the waters reserved by the President's proclamation.

The judgment of the District Court is affirmed.

[Endorsed]: Opinion. Filed March 19, 1917. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Decree U. S. Circuit Court of Appeals.**

Appeal from the District Court of the United States for the District of Alaska, Division No. 1.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Alaska, Division No. 1, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Decree. Filed and entered March 19, 1917. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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At a stated term to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourteenth day of May, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge, Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, etc.,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Order Denying Petition for Rehearing and Staying Issuance of Mandate to and Including June 18, 1917.**

On consideration thereof, and by direction of the Honorable WILLIAM B. GILBERT, WILLIAM W. MORROW, and WILLIAM H. HUNT, Circuit Judges, before whom the case was heard, ORDERED, that the petition, filed April 18, 1917, on behalf of the appellant, for a rehearing of the above-entitled cause be, and hereby is denied.

It is FURTHER ORDERED that the issuance of the mandate of this court under rule 32 in the above-entitled cause be, and hereby is stayed to and including June 18, 1917.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Notice of Appeal to Supreme Court, U. S., and Petition for Allowance Thereof.**

To the United States of America, Appellee, and John W. Preston, James A. Smiser and M. A. Thomas, Its Solicitors.

The Alaska Pacific Fisheries, a corporation, the appellant in the above-entitled cause, hereby gives notice, that conceiving itself to be aggrieved by the decree entered in this cause affirming the decree appealed from rendered by the United States District Court for the District of Alaska, Division No. 1, July 7th, 1916, granting an Injunction as prayed for in the Bill of Complaint, filed in said District Court by Appellee herein, does hereby appeal from the decision and decree of the United States Court of Appeals of the Ninth Circuit aforesaid, and from each and every part and the whole thereof, to the Supreme Court of the United States.

And this appellant prays the Court to allow this appeal and to direct that a transcript of the record proceedings and papers upon which said decree of affirmance was based, together with all the additional proceedings and papers pertaining to this cause in this court, be duly authenticated and sent to the Supreme Court of the United States at Washington City.

This appellant hereby tenders and files herewith an Assignment of Errors which it conceives were committed in the affirmance of such decree, together with its prayer for reversal.

C. H. HANFORD,
Solicitor for Appellants.

Service of the foregoing Notice of Appeal and Petition for Allowance thereof, by receipt of a copy thereof, on this 29th day of May, 1917, is hereby acknowledged.

JNO. W. PRESTON,
United States District Attorney of the Northern District of California,
Solicitor for Appellee.

[Endorsed]: Notice of Appeal to Supreme Court, U. S., and Petition for Allowance Thereof. Filed May 29, 1917. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

**Assignment of Errors and Prayer for Reversal.**

The Alaska Pacific Fisheries, a corporation, defendant in this cause in the United States District Court for the District of Alaska, Division No. 1, and appellant in this court, conceiving itself to be aggrieved by the decision and decree of this Court, rendered and entered on the 19th day of March, 1917, whereby the decree of said District Court for

the District of Alaska, Division No. 1, appealed from herein, was by this Court affirmed, and intending to take an appeal to the Supreme Court of the United States, does hereby specify and assign as errors relied upon for the reversal of said decision and decree by the Supreme Court of the United States, the following rulings, declarations, opinion and decree of this Court.

First: This Court erred in affirming the decision and decree of the United States District Court for the District of Alaska, Division No. 1, rendered on the 7th day of July, 1916, whereby said District Court granted an Injunction against this appellant forbidding the driving, constructing or completing of any fish-trap or structure whatsoever on and at Annette Islands or in the waters appurtenant thereto or surrounding the same within 3,000 feet from the shore at mean low tide, and from maintaining or operating any fish-trap or structure for fishing therein and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish-trap at or near Cedar Point, Annette Islands aforesaid, and from delivering or causing to be delivered, any material whatsoever for the construction of fish-traps upon said Island or in said waters; and whereby it was further ordered and decreed that this appellant do vacate the lands and waters mentioned in the proclamation of the President of the United States of April 28th, 1916, and to remove therefrom any and all structures therefor erected by this appellant; and whereby it was further ordered that the plaintiff in this cause have judgment

for its costs and disbursements and that execution issue therefor.

Second: The Court erred in and by its failure and refusal to reverse the decree of said District Court of the District of Alaska, Division No. 1, notwithstanding the errors of said District Court specified in the Assignment of Errors upon which the Appeal from its decree was based, and numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, and set forth in full on pages 204 to 211, inclusive, of the printed record in this cause, and this appellant hereby gives notice that it continues to rely upon each of the said alleged errors as grounds for the reversal of the decree in this cause.

Third: This Court erred in that part of the opinion of the court which is herein quoted as follows: "In the present case there is no question about the President's reservation of Annette Island being in conflict with the preceding act of Congress. It is not; but on the contrary the reservation is in conformity with the purpose of the act and was designed to carry that purpose into practical effect."

Fourth: This Court erred in that part of its opinion contained in the following quotation: "We can think of nothing more practical, under all the circumstances, than the reservation by the President, of the waters immediately surrounding Annette Island for the use and benefit of these Indians; and this was undoubtedly the practical purpose Congress had in view when it made the original reservation."

Fifth: This Court erred in that part of its opinion contained in the following quotation: "And we must

hold that the reservation of Annette Island by the Act of Congress, and its surrounding waters, by the President's proclamation, is fully sustained."

Sixth: This Court erred in that part of its opinion contained in the following quotation: "We think that such a reservation is for the benefit of the whole people; it protects the food supply of the whole tribe of Indians and other native Indians that may join them, and provides the means for their self support. In guarding against the possibility of these Indians becoming a public charge, the measure is clearly a public concern and for the benefit of the whole people."

Seventh: This Court erred in that part of its opinion contained in the following quotation: "The appellants have no title to the soil under the waters where they have driven the piles for the fish-trap, which is the subject of this complaint, nor have the plans for the structure been approved by the Chief of Engineers, nor the structure itself authorized by the Secretary of War. The United States, the complainant in this case, is the owner of the soil; the appellants, as defendants are mere trespassers."

Eighth: The Court erred in that part of its opinion contained in the following quotation: "Under the law, as declared in the case just cited (Manchester v. Massachusetts, 139 U. S. 240) and in Weber v. Harbor Commissioners, *supra,* the appellants have acquired no rights, vested or otherwise, to construct or maintain a fish-trap within the waters reserved by the President's proclamation."

Ninth: This Court erred in its decision and decree

herein in giving effect to Section 10 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1121, 1151) as being applicable to the matter in controversy herein and in the construction of said Act of Congress as being prohibitory to the construction, maintenance and operation of fish-traps in the public waters of Alaska, which did not, in effect, obstruct or impede navigation.

Tenth: This Court erred in its decision and decree herein in its failure to observe and give consideration to the fishery law of Alaska enacted by Congress June 26th, 1906, page 478, 34 U. S. Stat., and failing to recognize and sustain the appellant's rights to maintain a fish-trap in the waters of Alaska conforming with the specifications of said act of Congress.

Eleventh: This Court erred in its decision and decree herein which is a denial of appellant's rights as a citizen of the United States to enjoy the common rights of all citizens to take fish in a lawful manner from the public waters within the domain of the United States Government.

Twelfth: This Court erred in that part of its opinion contained in the following quotation: "But the dominant question, as presented by the complaint and answer, is the right of appellants to enter upon the waters mentioned in the complaint and to erect the fish-trap at the place designated." It is the contention of this appellant that the dominant question in this case is as to the power of the President of the United States under the Constitution of the United States to create exclusive rights of fishery in the public waters of the United States, or to exclude any

citizen from the enjoyment of fishing rights in public waters of the United States by proclamation.

Thirteenth: This Court erred by its decision and decree in affirming the validity of the proclamation of the President of April 28th, 1916, purporting to create a reservation of the waters surrounding the Annette Islands for a space of 3,000 feet outward from the line of low tide, and it is the contention of the appellant that the issuance of said proclamation was in excess of any authority which the President may exercise consistently with the Constitution of the United States.

Fourteenth: This Court erred in its decision and decree affirming the validity of the proclamation issued by the President April 28th, 1916, which, in effect, extends and enlarges the boundaries of the reservation for the Metlakahtlan Indians as fixed and established by the Act of Congress referred to in said proclamation, to wit: Section 15 of the act to repeal Timber culture laws and for other purposes approved March 3, 1891, and it is the contention of this appellant that enlargement of boundaries of said reservation by a proclamation is contrary to, and a violation of said Act of Congress, and therefore, an unwarranted assumption of legislative power vested in the Congress of the United States; which power by being vested in Congress may not be exercised by the President of the United States consistently with the Constitution of the United States.

Fifteenth: This Court by its decision and decree, erred by failing and refusing to reverse the decree of the District Court for the District of Alaska, Di-

vision No. 1, on the ground that the plaintiffs' bill of complaint does not state facts sufficient to constitute grounds for the granting of an injunction nor for any equitable relief whatever.

Sixteenth: This Court erred in ordering that a mandate issue to the District Court of Alaska with directions to carry its decree into effect.

WHEREFORE, this appellant prays that the decision, order and decree of the United States Circuit Court of Appeals of the Ninth Circuit, made and entered in the above-entitled cause on the 19th day of March, 1917, and also the decree of the United States District Court for the District of Alaska, Division No. 1, in this cause, be reversed and set aside, and that by the final decree of the Supreme Court of the United States, this cause be dismissed.

C. H. HANFORD,
Solicitor for Appellants.

Service of the foregoing Assignment of Errors, by receipt of a copy thereof, on this 29th day of May, 1917, is hereby acknowledged.

JNO. W. PRESTON,
United States District Attorney of the Northern District of California,
Solicitor for Appellee.

[Endorsed]: Assignment of Errors and Prayer for Reversal. Filed May 29, 1917. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Affidavit of Amount in Controversy.**

State of California,
City and County of San Francisco,—ss.

C. H. Hanford, being first duly sworn, deposes and says: I am a citizen of the United States over the age of twenty-one years of age; a resident of the City of Seattle, in the State of Washington, and one of the solicitors for the appellant in this case. The amount and value involved in this lawsuit exclusive of interest and costs is in excess of Five Thousand ($5,000) Dollars.

C. H. HANFORD.

Subscribed and sworn to before me this 29th day of May, A. D. 1917.

[Seal] PAUL P. O'BRIEN,
Deputy Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit.

Service of the within affidavit by copy admitted this 29 day of May, 1917.

JNO. W. PRESTON,
Attorney for Appellee.

[Endorsed]: Affidavit of Amount in Controversy. Filed May 29, 1917. F. D. Monckton, Clerk.

---

*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Order Allowing Appeal to the Supreme Court, U. S., and Fixing the Amount of the Bond on Appeal.**

Now, on this 29th day of May, 1917, the above-named appellant, by its solicitor, C. H. Hanford, appearing in open court, presents Notice of Appeal and Petition for Allowance thereof to the Supreme Court of the United States, together with an assignment of alleged errors and an affidavit showing the value and the amount in controversy involved in this suit to be a sum exceeding Five Thousand ($5,000) Dollars, exclusive of interest and costs, and proof of service of said papers upon the

United States District Attorney of the Northern District of California, one of the solicitors for the Appellee,—

THEREFORE, it is ORDERED by the Court, that the prayer of said appellant for Allowance of its Appeal to the Supreme Court of the United States, from the final decree of this Court, be, and the same is hereby allowed.

IT IS FURTHER ORDERED BY THE COURT, that the amount of the bond on Appeal to be filed herein in accordance with the rules of the Court, be, and the same is hereby fixed at One Thousand Dollars.

IT IS FURTHER ORDERED BY THE COURT, that the original maps, charts and exhibits received by the Clerk of this Court from the United States Court of the District of Alaska, Division No. 1, pertaining to this cause, be transmitted with the transcript of the record herein to the Clerk of the Supreme Court of the United States.

Done this 29th day of May, 1917.

WM. B. GILBERT,
United States Circuit Judge, Presiding.

Service of the within Order Allowing Appeal by copy admitted this 29th day of May, 1917.

JNO. W. PRESTON,
Attorney for Appellee.

[Endorsed]: Order Allowing Appeal to Supreme Court U. S., and Fixing Amount of Bond on Appeal.

*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Bond on Appeal to the Supreme Court.**

KNOW ALL MEN BY THESE PRESENTS: That we, the Alaska Pacific Fisheries, a Corporation, as principal, and The Aetna Accident and Liability Company, a Corporation, as surety, are held and firmly bound unto the United States of America, appellee in the above-entitled cause in the sum of One Thousand ($1,000) Dollars, to be paid unto the United States of America for the payment of which well and truly to be made, we bind ourselves, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of May, 1917.

WHEREAS, the above-named Alaska Pacific Fisheries, a corporation, appellant in the above-entitled cause, is prosecuting an appeal to the Supreme Court of the United States of America, to reverse the decree rendered in the above-entitled cause by

the United States Circuit Court of Appeals for the Ninth Circuit on the 19th day of March, 1917.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Alaska Pacific Fisheries, a corporation, shall prosecute said appeal to effect and pay all costs in said cause if it fail to make its plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

ALASKA PACIFIC FISHERIES, a Corporation.

By C. H. HANFORD,
Its Attorney.

THE AETNA ACCIDENT AND LIABILITY COMPANY.

By G. S. STUART,
Resident Vice-President.

[Seal] Attest: R. A. KEELER,
Resident Asst. Secretary.

Dated this 29th day of May, A. D. 1917.

Approved this 29th day of May, 1917.

WM. B. GILBERT,
Senior United States Circuit Judge, Ninth Judicial Circuit.

Service of the within bond by copy admitted this 29th day of May, 1917.

JNO. W. PRESTON,
Attorney for Appellee.

[Endorsed]: Bond on Appeal to Supreme Court, U. S. Filed May 29, 1917. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Praecipe for Transcript of Record on Appeal to Supreme Court, U. S.**

To the Clerk of the Said Court:

Sir: Please make and furnish me with a certified printed Transcript of the Record (including the proceedings had in said Circuit Court of Appeals) in accordance with the Rules of the Supreme Court of the United States and not less than thirty (30) uncertified copies thereof for use upon appeal to the Supreme Court of the United States in the above-entitled cause, the said Transcript to consist of a copy of the following:

(1) Printed Transcript of Record on which the appeal was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following-entitled proceedings which were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

(2) Order of Submission, entered Oct. 26, 1916;

(3) Order Directing Filing of Opinion, entered Mar. 19, 1917;

(4) Opinion, filed Mar. 19, 1917;

(5) Decree, filed and entered Mar. 19, 1917;

(6) Order Denying Petition for Rehearing, and Staying Issuance of Mandate, entered May 14, 1917;

(7) Petition for Appeal, and Order Allowing Appeal and Fixing Amount of Supersedeas Bond, and Affidavit of Amount in Controversy;

(8) Assignment of Errors;

(9) Bond on Appeal;

(10) Citation on Appeal;

(11) Praecipe for Record on Appeal;

(12) All Original Exhibits on File in Above Cause; and

(13) Clerk's Certificate to Transcript of Record.

Please prepare the thirty or more uncertified printed copies of the said record, by printing thirty or more copies of the above-mentioned proceedings that were had and papers that were filed in said cause in said Circuit Court of Appeals, and by binding one of the latter printed copies of said proceedings at the end of each of the thirty or more extra copies of the printed Transcript of Record, by which said appeal was heard in said Circuit Court of Appeals.

C. H. HANFORD,
Counsel for Appellant.

Received copy of within praecipe this 29th day of May, 1917.

JNO. W. PRESTON,
United States Attorney,
Counsel for Appellee.

[Endorsed]: Praecipe for Transcript of Record on Appeal to Supreme Court U. S. Filed May 29, 1917. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Appeal to the Supreme Court of the United States.**

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and sixty-six (266) pages, numbered from and including 1 to and including 266, to be a true copy of the record made pursuant to the praecipe filed by counsel for the appellant on the 29th day of May, A. D. 1917, under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that

the same, together with the accompanying original exhibits, viz.: Plaintiff's "A," Defendant's Nos. 1 and 2, Exhibit, Pencil Sketch to Accompany Affidavit of E. P. Walker No. 2, constitute the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to the said praecipe.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of June, A. D. 1917.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2828.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under It or in Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Citation on Appeal to Supreme Court, U. S.**

United States of America,—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the City of Washington, in the District of Columbia, on the 28th day of July, A. D. 1917, pursuant to an order allowing an appeal from the final decree of the United States Circuit Court of Appeals for the Ninth Circuit, dated May 29th, A. D. 1917, in the above-entitled cause, wherein the Alaska Pacific Fisheries, a corporation, is appellant, and you are appellee, to show cause, if there be, why the said decree in the said cause mentioned should not be corrected, and why speedy justice should not be done to the appellant in that behalf.

WITNESS, the Honorable WILLIAM B. GILBERT, United States Circuit Judge for the Ninth

Judicial Circuit, and one of the Judges of the said Circuit Court of Appeals, at San Francisco, California, this 29th day of May, A. D. 1917, and of the Independence of the United States, the 141st.

WM. B. GILBERT,

United States Circuit Judge for the Ninth Judicial Circuit, and one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Receipt of a copy of within citation is hereby admitted this May 29, 1917.

JOHN W. PRESTON,
U. S. Atty.,
Atty. for Appellee.

[Endorsed]: Citation on Appeal to Supreme Court U. S. Filed May 29, 1917. F. D. Monckton, Clerk.

# In the Supreme Court of the United States.

OCTOBER TERM, 1917.

ALASKA PACIFIC FISHERIES, APPELLANT,
*v.*
THE UNITED STATES OF AMERICA.
No. 543.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

**MOTION BY THE UNITED STATES TO ADVANCE.**

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

This is an appeal from a decree of the Circuit Court of Appeals for the Ninth Circuit affirming a decree of the District Court of the United States for the District of Alaska granting an injunction petitioned for by the United States and enjoining the Alaska Pacific Fisheries from continuing the construction and requiring the removal of a fish trap in certain waters surrounding Annette Island, Alaska, which waters had, by proclamation of the President, been reserved for the exclusive use and benefit of the Metlakahtla Indians.

41770—18

The principal question presented is whether the President, under certain acts of Congress, had power to reserve for the benefit and use of the Indians in question for general fishing purposes the navigable waters within a specified limit surrounding certain islands constituting the reservation of the Indians to the exclusion of the public generally.

The case is of importance to the Department of the Interior in connection with its guardianship of these Indians and its desire to make them self-supporting, and for these reasons an early determination by this court is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
*Solicitor General.*

MARCH, 1918.

○

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FILED
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JAMES D. MAH

# APPELLANT'S BRIEF

IN THE

# Supreme Court of the United States

October Term 1918

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No. 212

ALASKA PACIFIC FISHERIES

Appellant

vs.

THE UNITED STATES OF AMERICA.

---

Appeal from the United States Circuit Court of Appeals
For the Ninth Circuit.

---

C. H. HANFORD, Seattle, Washington
JOHN A. HELLENTHAL,
HELLENTHAL & HELLENTHAL, Juneau, Alaska
Solicitors for Appellant.

LOWMAN & HANFORD CO., SEATTLE

# INDEX


Page

Decree and Injunction ..... 21
Errors Specified ..... 9
Main Issue ..... 2
Material Facts ..... 3
Statement ..... 1
**Argument by Hellenthal** ..... 22-112
Act of Congress Reserving Annette Island ..... 26
The President's Proclamation ..... 27, 65
Right of the Government to Create in the Public Navigable Water a Fishing Reservation for the Benefit of the Metlakahtlans to the Exclusion of All Others ..... 28
Right to Construct and Maintain a Fish-Trap ..... 77
Rivers and Harbors Act ..... 104
**Argument by Hanford** ..... 113-161
Act Reserving Annette Island Is Specific—It Contains No Implied Promise of Benefits Additional to the Right to Occupy and Use as Others Occupy and Use Land ..... 145
Equity—There Is No Equity in the Bill ..... 114, 141
Precedents ..... 122
This Case as One of First Impressions ..... 128
Rules, Regulations and Restrictions to Be Prescribed ..... 135
President Not Authorized to Create a Reservation for Aliens ..... 130
President Harrison's Proclamation ..... 126
No Proof of the Declared Intention Contained in the President's Proclamation ..... 137
The Government Is Not the Real Party in Interest ..... 141
The Metlakahtlans Are Aliens ..... 143
The Appellant's Fish-Trap Is a Lawful Structure; Occupying a Site Lawfully Selected and Used ..... 148
The Rivers and Harbors Act Affords No Justification for an Injunction in This Case ..... 152
The Government Has the Affirmative Side of the Issues Raised by the Pleadings; and the Burden of Establishing Equitable Ground for an Injunction ..... 158


## APPENDIX


Opinion of Attorney General Garland ..... 162
Congressional Record Containing Historical Statement Concerning Metlakahtlans and Annette Island ..... 165
Department of the Interior Decision Denying Authority of the Executive to Make a Reservation of Shore Land for Indians in Alaska ..... 171


## CITATIONS


Arnold v. Mundy, 6 N. J. Law, 1 ..... 30, 33, 37, 71
Ashton, United States v., 170 Fed. Rep. 509 ..... 74
Bank v. County of Yankton, 101 U. S. 133; 25 L. Ed. 1046 ..... 141
Bank v. United States, 206 Fed. Rep. 379 ..... 155
Barney v. Keokuk, 94 U. S. 324, 328; 24 L. Ed. 224 ..... 119
Baron v. Alexander, 206 Fed. Rep. 272 ..... 124, 146
Bevans, United States v., 3 Wheat. 336 ..... 108
Chase, United States v., 135 U. S. 255; 34 L. Ed. 117; 10 Sup. Ct. 756 ..... 156
Civil Rights Cases, 109 U. S. 3-25; 27 L. Ed. 835; 3 Sup. Ct. 18 ..... 116
Clark, United States v., 200 U. S. 601-608; 50 L. Ed. 613-616; 26 Sup. Ct. 340 ..... 161
Commonwealth v. Vincent, 108 Mass. 441 ..... 64
Commonwealth v. Weatherhead, 110 Mass. 175 ..... 63
Diamond C. & C. Co., United States v., 233 U. S. 236; 59 L. Ed. 936-939 ..... 161
Farnham On Waters, Sec. 394 ..... 85
Folk v. United States, 233 Fed. Rep. 191-2 ..... 161
Garland's Opinion, 18 Opinions of Attorneys General 557 ..... 131, 141, 143, 162

Page
Gallup v. Tracey, 25 Conn. 10 ..... 85, 87, 88
Glover v. Powell, 10 N. J. Equity (2 Stockt.) 211 ..... 94
Gould On Waters, 3rd Ed. Secs. 1, 2, 30, 32, 34, 36, 39, 189 ..... 140
Illinois Central R. Co. v. Chicago, 176 U. S. 646 ..... 31
Illinois Central R. Co. v. Illinois, 146 U. S. 387 ..... 29, 37, 38, 39, 45, 50, 52, 55, 61, 72, 73, 78
I Kent's Comm. Star p. 384 ..... 141
Knight v. United States Land Association, 142 U. S. 183; 12 Sup. Ct. 258 ..... 49
Lay v. King, 5 Day 72 ..... 85, 86
Leovy v. United States, 177 U. S. 631, 633 ..... 154
Lewis v. City of Portland, 35 Pac. 256 ..... 85, 88
Lincoln v. Davis, 53 Mich. 375, 51 Am. Rep. 116 ..... 83
Mackey, United States v., 214 Fed. Rep. 146 ..... 56
McCready v. Virginia, 94 U. S. 391; 24 L. Ed. 248 ..... 29, 85, 140
Manchester v. Massachusetts, 139 U. S. 240, 259, 260; 35 L. Ed. 159; 11 Sup. Ct. 559 ..... 46, 59, 141, 150
McCullagh, United States v., 221 Fed. Rep. 288, 292 ..... 141
Mann v. Tacoma Land Co., 153 U. S. 273, 286 ..... 119
Martin v. Waddell, 16 Peters 345 ..... 37
Maxwell Land Grant Case, 121 U. S. 325, 375, 381; 30 L. Ed. 949, 958-9; 7 Sup. Ct. 1015 ..... 161
Midwest Oil Co., United States v., 236 U. S. 459, 59 L. Ed. 673 ..... 70, 71
Middleton v. Flat River Booming Co., 27 Mich. 533 ..... 93
Missouri Pac. R. Co. v. United States, 211 Fed. Rep. 893, 896 ..... 156
Mountain Copper Co. v. United States, 142 Fed. Rep. 629 ..... 161
Nelson v. Northern Pacific R. Co., 188 U. S. 108; 47 L. Ed. 406; 23 Sup. Ct. 302 ..... 133
Newhall v. Sanger, 92 U. S. 765, 23 L. Ed. 769 ..... 120
New York ex rel. Kennedy v. Becker, 241 U. S. 556; 60 L. Ed. 1166 ..... 126
Parker v. People, 111 Illinois 588 ..... 124
Penaukee v. Savoy, 74 Am. St. Rep. 859 ..... 39
Pitkin v. Olmstead, 1 Root (Conn.) 217 ..... 85, 86
Post v. Kreischer, 8 N. E. 365 ..... 85, 87
Rasmussen v. United States, 197 U. S. 516 ..... 55
Rossmiller v. State, 89 N. W. 839 ..... 29, 39
Rowe v. Smith, 48 Conn. 444 ..... 64
Russian American Co. v. United States, 199 U. S. 579 ..... 126
San Jacinto Tin Co., United States v., 125 U. S. 273, 286; 31 L. Ed. 747, 758; 8 Sup. Ct. 850 ..... 142
Shauver, United States v., 214 Fed. Rep. 157 ..... 141
Shively v. Bowlby, 152 U. S. 1-58; 38 L. Ed. 331; 14 Sup. Ct. 548 ..... 46, 47, 57, 59, 122, 146
Stinson, United States v., 197 U. S. 200; 25 Sup. Ct. 426; 49 L. Ed. 724 ..... 160
Washington Securities Co. v. United States, 234 U. S. 76, 80; 58 L. Ed. 1220, 1223 ..... 161
Weber v. Harbor Commissioners, 18 Wall. 57, 65 ..... 77, 78, 79, 150, 151
Weston v. Sampson, 62 Mass. 351 ..... 64
Williamson v. United States, 207 U. S. 425; 52 L. Ed. 278; 28 Sup. Ct. 163 ..... 132, 135

## STATUTES

Annette Island Reservation Act, March 3, 1891, 26 U. S. Stat. 1101 ..... 8, 121, 144, 145
Alaska Compiled Laws 1913, Sec. 24, Act of March 4, 1907: Provides for Licensing Metlakahtlans to Navigate Steam Vessels, 34 Stat. 1411 ..... 118
Future States in Alaska to Have Proprietary Rights in Shore Lands and Waters, Act of May 14, 1898, 30 Stat. 409, Compiled Laws of Alaska, Sec. 92, 1 F. S. A. 45 ..... 133
Fisheries in Alaska, Compiled Laws of Alaska, Secs. 254, 261, 262; Act of June 14, 1906, 34 Stat. 263; Act of June 26, 1906, 34 Stat. 478 ..... 75, 82, 148
Rivers and Harbors Act, March 3, 1899, 30 Stat. 1151 ..... 104, 152, 153

IN THE

# Supreme Court of the United States

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No. 212

ALASKA PACIFIC FISHERIES, a Corporation,
Appellant

vs.

THE UNITED STATES OF AMERICA.

---

Appeal from the United States Circuit Court of Appeals
For the Ninth Circuit.

---

## BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

This is an appeal from a decision of the Circuit Court of Appeals for the Ninth Circuit affirming a decree entered by the District Court for the Territory of Alaska, enjoining the appellant from maintaining a fish-trap situate in the navigable waters of the United States to the seaward of the westerly shore of Annette Island.

This suit was instituted, June 1, 1916, by the government of the United States in the District Court

of Alaska, Divison No. 1, against the Alaska Pacific Fisheries, an Oregon corporation, to compel obedience to a proclamation by the President, issued April 28th, 1916; the prayer of the complaint being for an injunction forbidding the taking of fish within a designated zone surrounding Annette Island and adjacent Islets and requiring the defendant to remove a certain fish-trap, which it had theretofore constructed within said zone. The material facts to be considered on this appeal and the issues of law and fact to be decided, are as follows:

**The Main Issue**

The proclamation is set forth as "Exhibit A" annexed to the bill of complaint (See record pp. 11-12) Its preamble quotes section 15 of an act of Congress which sets apart the body of lands known as Annette Islands, as a reservation for the use of the Metlakahtlan Indians, and it declares the waters within three thousand feet from the shore of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island, and the adjacent rocks and islets, to be "hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the fisheries laws and regulations of the United States as administered by the Secretary of Commerce." And it warns all unauthorized persons not to fish in or use any of said waters.

The main issue made by the pleadings is correctly

and concisely stated in the following excerpt from the memorandum opinion of the Judge of the District Court:

> "The Government by this suit seeks an injunction to prevent the defendant from operating said trap and to compel the removal of said trap, basing its suit on the claim that the continuance of the trap at the *locus quo* is in defiance and violation of the terms of the Act and the proclamation, and is also in violation of section 10 of the Rivers and Harbors Act approved March 3, 1899.
>
> The defendants contend that the Act itself does not reserve any water and that the proclamation is unauthorized so far as it attempts to reserve any part of the waters and so is null and void, and that the trap is not an obstruction to navigation and so does not come under the inhibition of the Rivers and Harbors Act aforesaid." (Record, p. 37.)

## Material Facts of the Case.

### I

The appellant is an Oregon corporation carrying on the business of catching, canning and marketing salmon; operating three canneries in Alaska, one of which is situated at Chomly and another at Yes Bay. By compliance with the laws of Alaska it is authorized to carry on said business as a corporation; this is alleged in its answer, and is not controverted. (Record, p. 25.)

### II.

The principal means of obtaining salmon for supplying all the canneries in Alaska is by use of traps; (record, p. 100); a trap consists of a line of piles

called a "lead" with wire webbing thereon and lateral projections at the end toward which the fish travel called a "heart," which guides the fish into an enclosure called a "pot" which confines them until they are taken therefrom into scows in which they are conveyed to canneries.

III.

In the year 1915 C. A. Burckhardt, president and general manager of the appellant, selected a location for a fish trap, not theretofore occupied, situated in front of a rocky reef adjacent to Cedar Point and Smugglers' Cove on the west side of Annette Island; and the appellant constructed a trap there at a cost of $4,000. That being the trap which is the principal subject of controversy in this suit, and it is the same kind of trap that is used in all other canneries in Alaska. (Record pp. 100-188.)

IV.

Cedar Point projects into Clarence Strait, which at that place is twelve miles wide and is one of the main divisions of the waters of Southeastern Alaska. (Record, p 99.)

V.

The trap as constructed is not an obstruction or impediment to navigation, but being equipped with lights and a bell it is helpful to navigators the same as a light-house would be; and it is not connected with the island, the end thereof nearest to the shore being at least 200 feet seaward from the shore line

at low tide, and use of the trap does not require any occupation or use of the island or its shore. (Record, pp. 98-102-103.)

VI.

On the 28th of April, 1916, the President issued a proclamation declaring the waters within a space of 3,000 feet from the shore line at mean low tide surrounding Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets to be a reservation for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands; and warning "all unauthorized persons not to fish in or use any of the waters" therein described. And within a few days thereafter the appellant was notified of said proclamation and to not fish or trespass within the space therein described. (Record, p. 87.)

VII

The appellant's trap is located within said space and it was completed, except the placing of webbing thereon ten days prior to the date of the proclamation; (Record, pp. 87-152); and prior to that time the appellant had in preparation for this season's operation of the two canneries at Chomly and Yes Bay expended money and incurred obligations to an amount exceeding $500,000 for materials, supplies and labor, in expectation that said trap would to a very considerable extent supply fish for canning in said two canneries. (Record, p. 91.)

VIII.

Deprivation of the use of said trap must necessarily cause a heavy loss to appellant, estimated at $50,000. (Record, p. 91.)

IX.

The appellant gave notice that it would not submit to such deprivation and loss, and denied the lawfulness of the President's Proclamation; this suit was instituted; the appellant answered the bill of complaint and the case was tried and submitted for decision on the merits and the Court rendered a decision and final decree granting the injunction prayed for, unconditionally, which if not set aside will be effective to confiscate appellant's property without compensation. On appeal to the Circuit Court of Appeals for the Ninth Circuit that decision was affirmed. The opinions of both Courts are in the Record, pp. 36-227.)

X.

Prior to the year 1887 the Metlakahtlans were a tribe of Indian natives of British Columbia inhabiting the village of Metlakahtla near Fort Simpson, B. C. They are reputed to have been, in their savage state, cannibals, but superior in physical and mental qualities to other Pacific Coast Indians. As a result of the missionary labors of William Duncan, a minister of the Church of England, they were converted to Christianity and made rapid progress in becoming educated and acquiring skill as mechan-

ics and to a praiseworthy extent adopted the manners of civilized people and became devout members of the Episcopal Church. They constructed and operated a saw mill and erected a commodious church edifice and were generally thrifty and contented. (Record, pp. 170-174.)

XI.

Because of a disagreement with his superior in church authority Duncan was deposed from his position as Missionary in charge of the community and another was appointed as his successor; the Indians revolted and, to emancipate themselves from control by the Bishop, they with Duncan as their leader emigrated to Annette Island. They came of their own volition under the egis of the American Flag, uninfluenced by any promise of grants or special privileges, but, like the Mayflower pilgrims, to enjoy religious liberty. They made a wise selection as a location for a colony, of a large uninhabited island which the chart in evidence (Record, p. 179) shows is surrounded by wide deep waterways.

XII.

The history of these people, their independence, enterprise and grit won for them the good will of the Americans and a welcome from our Government. After it had been decided that, the President lacked authority to reserve Annette Island for their use, (Opinions of the Attorney General, Vol. 18, p. 557), Congress did the extraordinary thing, by a

rider on the Act to Repeal Timber Culture Laws, of enacting as section 15 of said act:—

> "That until otherwise provided by law the body of lands known as Annette Islands, situate in the Alexander Archipelago, in southeastern Alaska, on the north side of Dixon's Entrance, be, and the same is hereby set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans, who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions as may be prescribed from time to time by the Secretary of the Interior." (Act of March 3, 1891, 26 U. S. Stat. 1101.)

## XIII.

With Duncan as their leader and manager these people made new homes on the island, erected a church edifice, built and operated a sawmill and a salmon cannery, built a schoolhouse and other public buildings, maintained their own school, and made further advancement by the younger men becoming competent navigators; and for twenty-five years maintained themselves independently and respectably, receiving no aid or benevolence from the Government, save and except by the permission granted by Congress to occupy the island, and one other favor granted by Congress, not accorded to other aliens, authorizing them to become licensed masters, pilots and engineers of steam vessels. (Act of March 4, 1907, 34 U. S. Stat. 1411—Compiled Laws of Alaska, 1913, Sec. 24.) It was about four years previous

to the commencement of this suit that a Government school was established on the island. Then Duncan lost control, the sawmill and cannery fell into disuse and many of the colonists left the island.

Contemporaneously with the proclamation the Secretary of the Interior executed a lease of the cannery to P. E. Harris of Seattle, a white man not related to the Metlakahtlans, but, before anything had been accomplished in pursuance of that scheme the cannery was destroyed by fire; the lessee failed to reconstruct it; the Secretary had no funds available for that purpose; and Congress refused to make a requested appropriation of $25,000.00 for such use.

Most of this history is narrated in a document printed in the Congressional Record, Senate proceedings, June 27, 1916, bound vol. p. 10046. For convenience that record is reproduced in the appendix to this brief.

## Errors Assigned.

Twenty-eight errors are assigned, which read as follows:

*First:* This Court erred in affirming the decision and decree of the United States District Court for the District of Alaska, Division No. 1, rendered on the 7th day of July, 1916, whereby said District Court granted an Injunction against this appellant forbidding the driving, constructing or completing of any fish-trap or structure whatsoever on and at Annette Islands or in the waters appurtenant thereto or surrounding the same within 3,000 feet from

the shore at mean low tide, and from maintaining or operating any fish-trap or structure for fishing therein and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish-trap at or near Cedar Point, Annette Islands aforesaid, and from delivering or causing to be delivered, any material whatsoever for the construction of fish-traps upon said Island or in said waters; and whereby it was further ordered and decreed that this appellant do vacate the lands and waters mentioned in the proclamation of the President of the United States of April 28th, 1916, and to remove therefrom any and all structures therefor erected by this appellant; and whereby it was further ordered that the plaintiff in this cause have judgment for its costs and disbursements and that execution issue therefor. (Record, pp. 254-5.)

*Second*: The Court erred in and by its failure and refusal to reverse the decree of said District Court of the District of Alaska, Division No. 1, notwithstanding the errors of said District Court specified in the Assignment of Errors upon which the Appeal from its decree was based and numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, and set forth in full on pages 204 and 211, inclusive, of the printed record in this cause, and this appellant hereby gives notice that it continues to rely upon each of the said alleged errors as grounds for the reversal of the decree in this cause. (Record, p. 255-pp. 204-211.)

*Third:* This Court erred in that part of the opinion of the Court which is herein quoted as follows:

> "In the present case there is no question about the President's reservation of Annette Island being in conflict with the preceding act of Congress. It is not; but on the contrary the reservation is in conformity with the purpose of the act and was designed to carry that purpose into practical effect." (Record, p. 255.)

*Fourth*: This Court erred in that part of its opinion contained in the following quotation:

> "We can think of nothing more practical, under all the circumstances, than the reservation by the President, of the waters immediately surrounding Annette Island for the use and benefit of these Indians; and this was undoubtedly the practical purpose Congress had in view when it made the original reservation." (Record, p. 255.)

*Fifth*: This Court erred in that part of its opinion contained in the following quotation:

> "And we must hold that the reservation of Annette Island by the Act of Congress, and its surrounding waters, by the President's proclamation, is fully sustained." (Record, pp. 255-6.)

*Sixth*: This Court erred in that part of its opinion contained in the following quotation:

> "'We think that such a reservation is for the benefit of the whole people; it protects the food supply of the whole tribe of Indians and other native Indians that may join them, and provides the means for their self-support. In guarding against the possibility of these Indians becoming a public charge, the measure is clearly a public concern and for the benefit of the whole people." (Record, p. 256.)

*Seventh*: This Court erred in that part of its opinion contained in the following quotation:

> "The appellants have no title to the soil under the waters where they have driven the piles for the fish-trap, which is the subject of this complaint, nor have the plans for the structure been approved by the Chief of Engineers, nor the structure itself authorized by the Secretary of War. The United States, the complainant in this case, is the owner of the soil; the appellants, as defendants are mere trespassers." (Record, p. 256.)

*Eighth*: This Court erred in that part of its opinion contained in the following quotation:

> "Under the law, as declared in the case just cited (*Manchester v. Massachusetts*, 139 U. S. 240) and in Webber v. Harbor Commissioners, *supra*, the appellants have acquired no rights, vested or otherwise, to construct or maintain a fish-trap within the waters reserved by the President's proclamation." (Record, p. 256.)

*Ninth*: This Court erred in its decision and decree herein in giving effect to Section 10 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1121, 1151) as being applicable to the matter in controversy herein and in the construction of said Act of Congress as being prohibitory to the construction, maintenance and operation of fish traps in the public waters of Alaska, which did not, in effect, obstruct or impede navigation. (Record, p. 257.)

*Tenth*: This Court erred in its decision and decree herein in its failure to observe and give consideration to the fishery law of Alaska enacted by Congress June 26th, 1906, page 478, 34 U. S. Stat., and

failing to recognize and sustain the appellant's rights to maintain a fish-trap in the waters of Alaska conforming with the specifications of said Act of Congress. (Record, p. 257.)

*Eleventh*: This Court erred in its decision and decree herein which is a denial of appellant's rights as a citizen of the United States to enjoy the common rights of all citizens to take fish in a lawful manner from the public waters within the domain of the United States Government. (Record, p. 257.)

*Twelfth:* This Court erred in that part of its opinion contained in the following quotation:

> "But the dominant question, as presented by the complaint and answer, is the right of appellants to enter upon the waters mentioned in the complaint and to erect the fish-trap at the place designated."

It is the contention of this appellant that the dominant question in this case is as to the power of the President of the United States under the Constitution of the United States to create exclusive rights of fishery in the public waters of the United States, or to exclude any citizen from the enjoyment of fishing rights in public waters of the United States by proclamation. (Record, p. 257.)

*Thirteenth*: This Court erred by its decision and decree in affirming the validity of the proclamation of the President of April 28th, 1916, purporting to create a reservation of the waters surrounding the Annette Islands for a space of 3,000 feet outward from the line of low tide, and it is the contention of the appellant that the issuance of said proclama-

tion was in excess of any authority which the President may exercise consistently with the Constitution of the United States. (Record, p. 278.)

*Fourteenth*: This Court erred in its decision and decree affirming the validity of the proclamation issued by the President April 28th, 1916, which, in effect, extends and enlarges the boundaries of the reservation for the Metlakahtlan Indians as fixed and established by the Act of Congress referred to in said proclamation, to-wit, Section 15 of the Act to Repeal Timber Culture Laws and for other purposes approved March 3, 1891, and it is the contention of this appellant that enlargement of boundaries of said reservation by a proclamation is contrary to, and a violation of said Act of Congress, and therefore, an unwarranted assumption of legislative power vested in the Congress of the United States; which power by being vested in Congress may not be exercised by the President of the United States consistently with the Constitution of the United States. (Record, p. 258.)

*Fifteenth*: This Court by its decision and decree, erred by failing and refusing to reverse the decree of the District Court for the District of Alaska, Division No. 1, on the ground that the plaintiff's bill of complaint does not state facts sufficient to constitute grounds for the granting of an injunction nor for any equitable relief whatever. (Record, p. 258.)

*Sixteenth*: This Court erred in ordering that a mandate issue to the District Court of Alaska with

directions to carry its decree into effect. (Record, p. 259.)

*Seventeenth*: The District Court for the Territory of Alaska, Division No. 1, erred in refusing to make and adopt Finding of Fact No. 1 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 1, which said proposed Finding of Fact No. 1 is in words and figures as follows:

"Defendant's Proposed Finding No. 1.

> The Court finds that in August of the year 1915 the defendants, pursuant to observations previously made, went upon the present site of the defendants' fish-trap off Cedar Point, Annette Island, and made soundings and by the use of a diver made such observations as were necessary to determine the question of feasibility of constructing a fish-trap at that place, and in this connection the Court finds that as the result of such observations the defendants decided that the driving and constructing of a fish-trap upon the site now occupied by the defendants' trap was practicable and feasible." (Record, pp. 204-5.)

*Eighteenth:* The District Court for the Territory of Alaska, Division No. 1, erred in refusing to make and adopt Finding of Fact No. 2 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 2, which said proposed Finding of Fact No. 2 is in words and figures as follows:

"Defendant's Proposed Finding No. 2.

> The Court finds that pursuant to and subsequent to the observations made in the month of August, 1915, referred to in Defendants' Proposed Finding No. 1, the defendants decided to

drive and construct a fish-trap upon the site now occupied by the defendants' trap and to enlarge their cannery at Chomly by installing therein such additional machinery and equipment as were necessary to pack the fish that would be caught and supplied by the fish-trap to be constructed off Cedar Point; that in the fall of 1915, and the winter of 1915-16, the Chomly cannery of the defendants was so enlarged and so supplied with additional equipment and machinery at an expense of approximately eighteen thousand five hundred ($18,500) dollars.

That in the judgment of the defendants the trap to be constructed off Cedar Point would supply 600,000 fish which, when canned, would fill 50,000 cases of canned salmon; that the defendants during the winter of 1915-16 contracted for the Chinese labor and purchased the tin and other supplies necessary to the canning of the said additional 50,000 cases of salmon at Chomly, at an expense to the defendants considerably in excess of twenty-five thousand ($25,000) dollars." (Record, pp. 205-6.)

*Nineteenth*: The District Court for the Territory of Alaska, Division No. 1, erred in refusing to make and adopt Finding of Fact No. 3 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 3, which said proposed Finding of Fact No. 3 is in words and figures as follows:

"Defendants' Proposed Finding No. 3.

That during the winter of 1915-16 the defendants procured the necessary piles and other equipment to drive and construct a trap off Cedar Point upon the site of the defendants' present trap, and on the 7th day of April in the spring of the year 1916 commenced the driving of such trap and completed the driving thereof

on the 18th day of April, 1916, and that the defendants expended in this behalf a sum in excess of four thousand ($4,000) dollars." (Record, pp. 206-7.)

*Twentieth*: The District Court for the Territory of Alaska, Division No. 1, erred in refusing to make and adopt Finding of Fact No. 4 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 4, which said proposed Finding of Fact No. 4 is in words and figures as follows:

"Defendants' Proposed Finding No. 4.

That all available sites for fish-traps, so far as known to the defendants, within the area from which fish can be supplied to the Chomly cannery of the defendants, have been occupied and there are no salmon to be purchased upon the market within the area from which such salmon can be taken to Chomly and canned in order to furnish the Chomly cannery with the fish necessary to fill the 50,000 cases representing the increased capacity of the cannery." (Record, p. 207.)

*Twenty-first*: The District Court for the Territory of Alaska, Division No. 1, erred in making and adopting its Finding of Fact No. 1 and in finding the facts as in said Finding No. 1 stated, which Finding No. 1 is made by the Court in words and figures as follows:

"That by the 15th section of the Act of Congress approved March 3, 1891, entitled 'an Act to Repeal the Timber Culture Laws' (26 Stats. L., 1101), and by the Proclamation of the President, dated the 28th day of April, 1916, there was reserved from use, occupation, settlement or benefit by any except Metlakahtlans and other Indians, the following lands and wa-

ters, to-wit: 'The body of lands known as Annette Islands, situate in the Alexander Archipelago, in Southeastern Alaska, on the north side of Dixon's Entrance' and 'the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets' and 'the bays of the said islands, rocks and islets'; and that by said proclamation warning was 'expressly given to all unauthorized persons not to fish in or use any of said waters.' " (Record, pp. 207-8.)

*Twenty-second*: The District Court for the Territory of Alaska, Division No. 1, erred in making and adopting its Finding of Fact No. 3 and in finding the facts as in said Finding No. 3 stated, which Finding No. 3 as made by the Court is in words and figures as follows:

"That prior to the issuance of the Proclamation hereinbefore mentioned, T. A. Heckman, superintendent of the defendant company, stated to P. E. Harris that he knew that a Proclamation in the premises was about to be issued by the Government." (Record, pp. 208-9.)

*Twenty-third*: The District Court for the Territory of Alaska, Division No. 1, erred in making and adopting its Finding of Fact No. 5 and in finding the facts as in said Finding No. 5 stated, which Finding No. 5 as made by the Court is in words and figures as follows:

"That notwithstanding said Act, Proclamation and notice, said defendant did maintain at the time of the filing of this suit, and does now maintain, possession of the area enclosed by said piles and refuses to remove the same, and refuses to vacate the premises, and threat-

ens and is about to and will, if not enjoined, perfect said trap as a fishing device and will catch therein large numbers of valuable fish, and will further trespass upon said land and water so reserved as aforesaid, to the irreparable injury of plaintiff, both in its sovereign capacity and as owner and proprietor, for which plaintiff would have no plain, speedy, or adequate remedy at law." (Record, p. 209.)

*Twenty-Fourth*: The District Court for the Territory of Alaska, Division No. 1, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 1 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 1, is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 1.

The Court holds as a matter of law that in the construction of a fish-trap off Cedar Point, Annette Island, and the maintenance thereof, the defendants were engaged in the exercise of their common right of fishery, and being so engaged in the exercise of a lawful right they acquired a vested right in said fish-trap from which they could not be devested by a subsequent Proclamation of the President or otherwise without compensation." (Record, pp. 209-210.)

*Twenty-fifth*: The District Court for the Territory of Alska, Division No. 1, erred in refusing to conclude as a matter of law and adopt as its conclusion of Law No. 2 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 2 is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 2.

> The Court concludes as a matter of law that the reservation of Annette Island as made by Act of Congress March 3, 1891, reserved the lands to ordinary high water mark only and did not include any of the navigable waters of the United States, and that the Proclamation of the President referred to in the pleadings herein was made without authority of law, in that the power to control and dispose of the territories and other property of the United States is by the Constitution vested in Congress." (Record, pp. 210-11.)

*Twenty-sixth*: The District Court for the Territory of Alaska, Division No. 1, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 3 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 3 is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 3.

> From the facts found the Court concludes that the plaintiff is not entitled to the relief demanded or to any relief whatsoever." (Record, p. 211.)

*Twenty-seventh*: The District Court for the Territory of Alaska, Division No. 1, erred in concluding as a matter of law and making and entering its Conclusion of Law, which is in words and figures as follows:

> "That plaintiff is entitled to an injunction as prayed for in the Complaint." (Record, p. 211.)

*Twenty-eighth*: The District Court for the Territory of Alaska, Division No. 1, erred in entering its

judgment and decree herein, which is in words and figures as follows:

"In the District Court for the District of Alaska, Division No. One, at Juneau.

"United States of America, Plaintiff, vs. Alaska Pacific Fisheries, a corporation, et al., Defendants. No. 1468-A.

## INJUNCTION AND FINAL DECREE.

This cause coming on to be heard heretofore, to-wit, on the 15th day of June, 1916, by consent of the parties on the issues raised on the bill, answer and reply and on the motion theretofore filed for an injunction, and the Court having heard the evidence introduced by the respective parties, and the cause having been fully submitted to the Court on the 17th day of June, 1916, and the Court having duly considered the same and heretofore having filed its Opinion herein and having made its Findings of Fact and Conclusions of Law herein, now upon motion of the plaintiff,

It is hereby ordered and decreed that the Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, be and they are enjoined and restrained from doing any act or thing whatsoever in driving, constructing or completing any fish-trap or structure whatsoever on and at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets, all in Southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, complet-

ing or maintaining a fish-trap at or near Cedar Point, Annette Island, aforesaid, and from delivering or causing to be delivered any material whatsoever for the construction of fishing traps upon said reserve or in said waters.

And it is further ordered and decreed that the defendant, the Alaska Pacific Fisheries, be and it is hereby ordered to vacate the lands and waters mentioned in the Proclamation of the President of the United States of April 28, 1916, and to remove therefrom, and to remove any and all structures therefrom heretofore erected therein by it directly or indirectly, and to refrain from in any manner trespassing in and upon said waters and said reserve.

And it is ordered that plaintiff herein have judgment for its costs and disbursements in this suit; and hereof let execution issue. Defendant is allowed 60 days from this date within which to file proposed Bill of Exceptions.

Done in open court this 7th day of July, 1916.

ROBERT W. JENNINGS,
District Judge."

(Record, pp. 211-214.)

## ARGUMENT.

The various errors assigned present for discussion certain definite legal propositions which can best be stated by setting forth the contentions of the parties.

It is contended on the part of the Government:

(1) That the Act of Congress creating the Annette Island Reservation set aside for the use of the Metlakahtlans not only the lands referred to but also the surrounding waters, and that Congress could lawfully reserve for the exclusive use of the Metlakahtlans not only the lands which form part of the

public domain, but also the surrounding public navigable waters;

(2) That if the public waters were not reserved for the exclusive use of the Metlakahtlans by this Act of Congress, the Proclamation of the President, above referred to, had that effect, and that the President was acting within his Constitutional powers and in a lawful manner in so reserving a portion of the public waters of the United States for the exclusive use of the Metlakahtlans;

(3) That the appellants, in entering upon the reserved area and constructing a fish-trap in connection with the conduct of the fishing business even though such entry and work of construction preceded in point of time the date of the President's Proclamation, were trespassers without right;

(4) That in any event the appellants had not obtained a permit from the Secretary of War for the construction of the fish-trap in question, and that for this reason the fish-trap should be removed, even though it was not situate in any harbor, haven, roadstead, etc., and did not obstruct navigation.

The appellant, on the other hand, contends:

(1) That the Act of Congress creating the reservation of Annette Island for the benefit of the Metlakahtlans reserved the land only, and that no attempt was made by Congress to interfere with the exercise of the public right of fishery in the navigable waters surrounding the island; and furthermore, that Congress lacked the legal and constitutional power to interfere with the exercise of this

public right by reserving the waters for the use of the Metlakahtlans, to the exclusion of all other citizens;

(2) That the President had neither legal nor Constitutional authority to reserve public waters of the United States for the use of the Metlakahtlans to the exclusison of other citizens, and that in any event, the appellant's fish-trap had been constructed at a cost of $4,000, and many thousand dollars had been invested and expended in facilities to pack the fish expected to be caught in this trap prior to the time that the President's Proclamation was issued;

(3) That the appellant in going upon the public waters of the United States in the vicinity of Cedar Point and driving its trap, was not a trespasser but was engaged in the exercise of its lawful right of fishery, which it had in common with all other citizens; that the trap in question was the usual necessary and proper device, such as is ordinarily used by Alaska fishermen in connection with the exercise of their right of fishery, the right to the use of which was expressly recognized and regulated by Act of Congress, Sections 261 and 262, Compiled Laws of Alaska; that the appellant could not only not be deprived, under the provisions of the Constitution, of their right of fishery but also that their fish-trap having been constructed by them in the lawful exercise of this right and in accordance with the express Act of Congress, recognizing and regulating the right of constructing such traps, became a vested

property right of which it could not be deprived under the Constitution, especially not by executive Proclamation, in view of the fact that the power of legislating for the Territories is by the Constitution expressly conferred upon Congress;

(4) That under the provisions of the Rivers and Harbors Act, the War Department is not interested in the construction of fish-traps so constructed as not to interfere with navigation and not situated in any port, roadstead, haven, harbor, canal, navigable river, or other portion of the public waters of the United States similar in character to one or more of those just enumerated.

The Circuit Court of Appeals took the position that it might be conceded, without so expressly deciding, that the Act of Congress setting aside Annette Island for the benefit of the Metlakahtlans did not reserve for the use of the Metlakahtlans any of the navigable waters surrounding the island but was limited in scope and effect to the land itself. It was held, however, that the proclamation made by the President, reserving the navigable waters surrounding the island for the Metlakahtlans and excluding all others therefrom, was valid, and that the President had ample power, under the Constitution, to make such a reservation. It was further held that the appellant in erecting a fish-trap was a trespasser; that the fish-trap itself was a purpresture that might be removed at the will of the Government; that the appellant

had no rights, vested or otherwise, in the waters surrounding Annette Island, or in the fish-trap constructed therein by them.

It was also indicated in the opinion, although not in terms so decided, that a fish-trap in navigable waters, however or wherever situated, must be constructed upon plans approved by the War Department.

**The Act of Congress Reserving Annette island.**

It is not deemed necessary to discuss at length the effect of the Act of Congress of May, 1887, reserving Annette Island for the Metlakahtlans. The language of the act is clear and explicit. It relates only to the "body of lands known as Annette Islands." Appellant's fish-trap is constructed in an arm of the ocean, its shoremost portion being 200 feet to the seaward of the line of extreme low tide.

An island is a body of land surrounded by water, and the water by which it is surrounded forms no part of it. Moreover, the effect of the Act is by its terms expressly limited to the "lands known as Annette Islands," precluding the idea that the waters surrounding Annette Island were to come within its terms. Again, it is a familiar rule of construction that grantees of lands bordering upon navigable waters take to the line or ordinary high tide only. *Shively v. Bowlby*, 152 U. S., 1. Nor is it material to a consideration of this case whether such grantees take to the line of ordinary high tide or to low water mark, as the appellant's fish-trap is

situate in deep water 200 feet to the seaward of the line of extreme low tide.

The officers of the Government originally took the view that the Act of Congress did not reserve for the use of the Metlakahtlans anything except the land itself. This is evidenced by the subsequent issuance of the President's Proclamation reserving the surrounding waters, and the Circuit Court of Appeals assumes this view to be the correct one, although it was not so expressly decided.

**The President's Proclamation.**

In passing upon the validity of the President's Proclamation, Judge Morrow, speaking for the Circuit Court of Appeals, says:

> "Referring to the last proposition first, it may be conceded, without so deciding, that the reservation of Annette Island as made by the Act of Congress of March 3, 1891, reserved the lands of the island to ordinary high-water mark only and did not include the shore between the high and low water marks, nor any navigable waters surrounding the island; but it does not follow that the Proclamation of the President of April 28, 1916, was made without authority. It may be conceded further that the power to control and dispose of the Territories and other property of the United States is by the Constitution vested in Congress; but it does not follow that the President may not reserve public lands and adjacent waters for useful purposes without being authorized so to do by express statute."

In discussing the correctness of this statement, two propositions present themselves. The first deals

with the right of the Government to create a private fishing reservation for the benefit of the Metlakahtlans, to the exclusion of all other citizens; and the second deals with the right of the President to make such reservation, even though it should be conceded that Congress had a legal right so to do.

**Right of the Government to Create in the Public Navigable Water a Fishing Reservation for the Benefit of the Metlakahtlans to the Exclusion of all Others.**

The Circuit Court of Appeals took the view that the Government has the same right to reserve portions of the public waters that it has to reserve portions of the public domain. In the course of the opinion (See Record, page 241), it is said:

> "Alaska is a territory of the United States. Annette Island is in that territory. The United States is, therefore, the owner in fee of the island and its shores; that is to say, it is the owner of the upland on the island and all the land between the high and low water marks. It is also the owner of the soil under all the navigable waters surrounding the island, and is sovereign and has dominion over all."

There is no doubt that the United States as the owner of Annette Island, which forms part of the public domain, has a right to set it aside for the benefit of the Metlakahtlans or devote it to any use whatsoever. But with reference to the public navigable waters, the case is very different. These do not form part of the public domain, and are not held by the Government as a land-owner but as a sovereign. The United States holds the navigable wa-

ters in trust for the use and benefit of the whole people who have therein the common rights of fishery and navigation. The right of fishery is a property right. (See *McCready v. Virginia*, 94 U. S., 391; *Rossmiller v. State*, 89 N. W., 839.) The manner in which this right may be exercised may be regulated by the Government with the view of making the right itself more valuable, but the Government has not right to create a private fishing reserve in which some have the right to fish to the exclusion of all others. The public lands are the property of the Government, held by it as a land-owner; the public waters are the property of the whole people, held by it as a sovereign. With reference to the latter, the government is the mere trustee.

This distinction was clearly drawn by this court in the case of *Ill. Cent. R. Co. v. Ill.*, 146 U. S., 387, where in speaking of the title by which the State holds navigable waters, it was said:

> "But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale."

And again in the same case, with reference to submerged lands, it was said:

> "The trust with which they are held therefore is Governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interests thus held, or when parcels can be disposed of without detriment to the public interests in the lands and waters remaining. This follows neces-

sarily from the public character of the property *being held by the whole people for purposes in which the whole people are interested.*"

And again quoting with approval the language used by Justice Bradley, in a case where the title by which the State held the State house and that by which it held navigable waters was compared, it is said:

> "The cases are clearly not parallel. The character of the title or ownership by which the State holds the State house is quite different from that by which it holds the land under the waters in and around its territory. The information rightfully states that prior to the Revolution the shores and lands under water of the navigable streams and waters of the Province of New Jersey belonged to the King of Great Britain, as part of the jura regalia of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the State as they were by the King, in trust for the public use of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust they were *publici juris;* in other words, *they were held for the use of the people at large.*

So in the case of *Arnold v. Mundy*, 6 N. J. Law, 1, it was said by the Supreme Court of New Jersey:

> "Nothing can be more clear, therefore, than that part of the property of a nation which has not been divided among the individuals, and which Vattel calls public property, is divided into two kinds, one destined for the use of the nation in its aggregate national capacity, being a source of the public revenue, to defray the

public expense, called the domain of the crown, and the other destined for the common use and immediate enjoyment of every individual citizen, according to his necessity, being the immediate gift of nature to all men, and, therefore, called the common property. The title of both these, for the greater order, and, perhaps, of necessity, is placed in the hands of the sovereign power, but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the King's forests and fell and carry away the trees, though it is the public property; it is placed in the hands of the King for a different purpose, it is the domain of the Crown, a source of revenue; so neither can the King intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation; the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power; and that, in theory at least, could not exist in a free government, such as England has always claimed to be."

And again with reference to the power exercised by the State in authorizing the construction of aid to navigation and in regulating the fisheries, it is said:

"But still this power, which may be thus exercised by the sovereignty of the State, is nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen."

Again in the more recent case of *Ill. Cent. R. Co. v. Chicago*, 176 U. S., 646, it was said:

"The State holds the title to the lands cov-

> ered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people for the purpose of navigation and fishery. The State has no power to barter and sell the lands as the United States sells its public lands, but the State holds the title in trust in its sovereign capacity and for the people of the entire state."

At common law the title to navigable tide waters vested in the King by virtue of his sovereignty But the right to fish therein belonged to the people of England who had therein a common of piscary. In ancient times the Norman kings, commencing with William the Conqueror, claimed and exercised the right of fencing or otherwise delineating the boundaries of portions of the navigable waters with a view of excluding the public therefrom and giving to some individual or class of individuals the exclusive right to fish therein. But the creation of these exclusive fisheries was deemed a usurpation by the people of England and an invasion of their common right of fishery. Accordingly a provision was inserted in Magna Charta under which the creation of private fisheries was in the future forbidden and in accordance with which King John agreed to annul and lay open all fisheries from which the public had been excluded by him. While the exclusive fisheries created prior to the reign of King John were left unmolested, it was provided that the fisheries not fenced in or shut against the common use in the time of King John should be from thenceforth laid open. And it was similarly

provided in the subsequent charter of King Henry III. Since Magna Charta no private or exclusive fisheries have been or could be created in the realm of England. From that time on it has been held that the King held the navigable waters by virtue of his sovereignty, but that the right to fish therein was a right common to all the people of England. The law upon this question was carefully and ably reviewed by the Supreme Court of New Jersey in the leading case of *Arnold v. Mundy*, 6 N. J. Law, 1, where it was said on page 73 of the opinion:

> "An exclusive right of fishing in a navigable river, is said to be a royal franchise, that is, a privilege or branch of the royal prerogative, granted by the King to a private person. This royal prerogative, we are told, was first claimed by the crown, upon the coming in of William the Conqueror, and was considered by the people to be a usurpation of their ancient common rights. Accordingly, in Magna Charta, which is said to be nothing more than a restoration of the ancient common law, we find this usurpation broken down and prohibited in future. That charter, as passed in the time of King John, enacts, 'that where the banks of rivers had first been defended in his time (that is, when they had first been fenced in and shut against the common use, in his time), they should be from thenceforth laid open.' And, by the charter of Henry III, which is but an amplification and confirmation of the former, it is enacted, 'that no banks shall be defended (that is, shut against the common use) from henceforth, but such as were in defense in the time of King Henry our grandfather, by the same places and the same bonds as they were wont to be in his time.' By this charter it has been

understood, and the words fairly import, that all grants of rivers, and rights of fishery in rivers or arms of the sea, made by the kings of England before the time of Henry II, were established and confirmed, but that the right of the Crown to make such royal grants, and by that means to appropriate to individuals what before was the common right of all, and the means of livelihood for all, for all future time, was wholly taken away. And whatever diversity there may be found in the books, with respect to the different kinds of fishery, it can no way affect the operation of the charter in this respect, because that forbids all manner of fencing in, or shutting, fisheries against the common use. All claim, therefore, of an exclusive right of fishery in a navigable river, founded upon the King's grant or prescription, which presupposes a grant, must reach as far back as Henry II."

With reference to the character of the King's title to the navigable waters, the Court says on page 71:

"Everything susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become private property. Those things not divided among the individuals still belong to the nation, and are called public property. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called 'the domain of the crown or of the republic'; others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to

the laws which regulate their use, and are called common property. Of this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts. Vattel, lib. i, 20; 2 Black. Com., 14. But inasmuch as the things which constitute this common property are things in which a sort of transient usfructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people."

And again on page 76, it is said:

"Upon the whole, therefore, I am of the opinion, as I was at the trial, that by the law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of the opinion that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a

right to use them according to his necessities, subject only to the laws which regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen, that is, *for his direct and immediate enjoyment.*

I am of opinion, that this great principle of the common law was, in ancient times, in England gradually encroached upon and broken down; that the powerful barons, in some instances, appropriated to themselves, also, in some instances during the same period, granted them out to their courtiers and favorites; and that these seizures and these royal favors are the ground of all the several fisheries in England, now claimed either by prescription or by grant; that the great charter, as it is commonly called, which was nothing but a restoration of common right, though it did not annul, but confirmed, what had been thus tortiously done, yet restored again the principles of the common law, in this as well as in many other respects; and since that time no king of England has had the power of granting away these common rights, and thereby despoiling the subject of the enjoyment of them."

The Court further held that upon the Revolution the title theretofore held by the King became vested in the State, and that the State through its Legislature might lawfully provide for the erection of wharves, docks and other aids to navigation and might also provide for the clearing and improvement of fishing places in order to increase the product of the fisheries, but that reference to this power of the State it is said:

> "But still this power, which may be thus exercised by the sovereignty of the State, is nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen."

Not only has the case of *Arnold v. Mundy* become a leading case in this country, but it has been at least twice referred to by this Court in the highest terms of approval. In the case of *Martin v. Waddell,* 16 Peters, 345, Chief Justice Taney, speaking for the Supreme Court of the United States, lends approval to the conclusions arrived at by the Supreme Court of New Jersey, and while an express decision upon the points involved in *Arnold v. Mundy* was not necessary in that case, the Chief Justice in referring to the opinion of the Supreme Court of New Jersey said that it was entitled to great weight, and that if the words of the Letters Patent under consideration in *Martin v. Waddell* had been more doubtful so as to require the application of the law laid down in *Arnold v. Mundy* to the decision, the Chief Justice says:

> "This decision, made upon such a question, with great delibertaion and research, ought, in our judgment, to be regarded as conclusive."

Again in the case of *Illinois Central Railroad Company v. Illinois,* 146 U. S., 387, Mr. Justice Field refers approvingly to the statement of Chief Justice Taney that the decision in *Arnold v. Mundy* was entitled to great weight and was made with great deliberation and research. And after observ-

ing that it was there held that the power exercised by the State of the lands and waters was nothing more than what was called the *jus regium*, the right of regulating, improving and securing them for the benefit of every individual citizen, he quotes other portions of the opinion in support of matters then under discussion.

In the case of the *Illinois Central Railway Company v. Illinois*, 146 U. S., 387, one of the questions before the Court related to the validity of a grant made by the State to the railroad company, of the submerged lands lying in front of the Chicago harbor. This Court adopted the conclusions reached by the New Jersey Court in the case of *Arnold v. Mundy* and held that the State of Illinois held the title to the navigable waters and the underlying submerged lands by virtue of its sovereignty, but that this was not an absolute title such as that by which the United States holds the public land intended for pre-emption and sale, but that the State held this title in trust, merely, for the use of the whole people who had in such waters the common right of fishery and that of navigation, and that the State could not substantially impair these rights, but was required by virtue of this trusteeship to so hold the waters and their underlying beds as to preserve to the whole people these public rights. It was held that the State might authorize the construction of wharves and piers in aid of navigation or dry-docks and other like structures and make grants of small parcels of the submegred lands

therefor, provided, that such grants did not substantially impair the rights of the public.

If the State were therefore to reserve or set aside its navigable waters for the use of a particular class such as the Metlakahtlans and exclude the public therefrom, its conduct in this regard would not be consistent with the exercise of that trust, which, as was said by this Court in *Illinois Central Railroad Company v. Illinois,* "requires the government of the State to preserve such waters for the use of the public."

This same doctrine was also declared by the Supreme Court of Wisconsin in the case of *Penaukee v. Savoy,* 74 Am. St. Rep., 859. It was there held that it was the duty of the State to preserve forever the common rights of navigation and fishery, and that the trusteeship of the State in connection with its title to the navigable waters was inviolable. The Court say:

> "It is the settled law that submerged lands of lakes within the boundaries of the State belong to the State in trust for public use, substantially the same as submerged lands under navigable waters at common law. Upon the admission of the State into the Unoin the title to such lands, by operation of law, vested in it *in trust to preserve to the people of the State forever* the common rights of fishery and navigation and such other rights as are incident to public waters at common law, which *trusteeship is inviolable, the State being powerless to change the situation by in any way* abdicating its trust."

Again in the case of *Rossmiller v. State,* 89 N. W.

839, the Supreme Court of Wisconsin had occasion to fully discuss the law upon this subject. The legislature had passed a law requiring persons engaged in cutting ice and shipping the same outside of the State to pay to the State ten cents per ton on all ice so cut and shipped. It was held that the right to cut ice on he public waters was in all respects like the right to fish therein, that the State held the navigable waters as a trustee of an express trust, the beneficiaries of which, on a plane of perfect equality, were the whole people of the State. It was held that the Act violated the due process clause of the Fourteenth Amendment. In reviewing the authorities and passing on the question presented, the Court say:

> "In Ice Co. v. Davenport, 149 Mass. 322, 21 N. E. 385, 14 Am. St. Rep. 425, the Court said: 'It is too well settled to be disputed that the property in the great ponds is in the commonwealth, that the public have the right to use them for fishing, fowling, boating, skating, cutting ice for use or sale, and other lawful purposes.'' The Supreme Court of Iowa, in Brown v. Cunningham, 82 Iowa 512, 513, 48 N. W. 1042, 12 L. R. A. 583, used this vigorous language in condemning the idea of government ownership, strictly so called, in public water: 'The Government has not more property in the water than a riparian owner or the public. The beneficient Creator opened the fountains which filled the stream for the benefit of his creatures, and has bestowed no power upon man or governments created by man to defeat his beneficence. Of course the use of the water may be regulated by the state, but the state may not forbid its use to the people.' In the State of

Maine it is held that the limit of state authority to interfere with the taking of ice from public water is the making of regulations which will preserve the common right to do so, Barrow v. McDermott, 73 Me. 441; Woodman v. Pitman, 79 Me. 456; 10 Atl. 321; 1 Am. St. Rep. 342. In Brastow v. Ice Co., 77 Me. 100, it was held that the right to take ice from a navigable lake is the common right of all and is governed by the same rule as the public right to boat and fish. In Woodman v. Pitman, supra, it was held that the right to take ice from navigable waters is as absolute as the right to walk upon the ice. In Rowell v. Doyle, 131 Mass. 474, the court said: 'The right of fishing as well as the right of taking ice in a great pond, is a public right, which every inhabitant who can obtain access to the pond without trespass may exercise, so long as he does not interfere with the reasonable exercise by others of these and like rights in the pond, and complies with any rules established by the legislature or under its authority.' It must be understood, in considering the above, that the reference to legislative regulations refers merely to such as the lawmaking power may adopt for the purpose of preserving the common rights, not to such as may be enacted to abridge or destroy those rights by treating the ice as state property instead of, if property at all in its natural state, that of the whole people. In Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330, the court said, in effect, that the right to take ice, as the right to take fish in public waters, is in the whole people, and that the first taker becomes, by his act of actual appropriation, the owner. The same was held in Manufacturing Co. v. Robertson, 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679, and is laid down by text writers as elementary. Gould, Waters, Sec. 191.

From the foregoing it will be seen that wher-

ever the title to the beds of navigable waters is in the state for public purposes, all the incidents of public waters at common law exist, and that they include the public right of taking ice to the same extent as the right of taking fish.

Up to this point we have not referred to authority in our own state, because we have none that applies, except in principle. We have abundance of judicial authority that applies when it is understood, as the fact is, as clearly indicated by what has been said, that the right to take ice from navigable lakes is of the same nature as any of the incidental rights of the people in such waters. We have demonstrated that, as it seems, if it can be done by reference to authority. We have by no means exhausted the decisions of the courts on the subject, but it seems useless to add more since there are no contrary decisions. We are safe in saying that no court has more definitely declared that the interests of the state in its navigable waters and the lands under them, and all the incidents thereof, are purely of a trust character, the beneficiaries, on a plane of perfect equality, being the whole people of the state, than this court has done in recent years. In doing that, it is believed, the people have been rescued from all dangers of losing any of those common rights by the invasion thereof by claims of private owners, if such dangers ever existed. That judicial service would be of little value if mere state ownership for the preservation of the common rights were so perverted as to support a claim of state ownership in hostility to such rights, a principle which, in the possibilities of its development, might lead to a serious impairment, if not utter ruin, of a most important trust. Such a consummation would be a very demoralizing example of how the subject of a trust may be converted to the private benefit of the trustee.

This court has repeatedly said that the navigable waters of the state have substantially the incidents of tidal waters at common law; that the title to the beds of such waters was reserved for the state by the ordinance of 1787, and vested in it at the instant it was admitted into the Union, to preserve the public characer of such waters with all such incidents; and that the state never has and never can constitutionally impair the trust. McLennan v. Prentice, 85 Wis. 427, 444, 55 N. W. 764; Willow River Club v. Wade, 100 Wis. 86, 113, 76 N. W. 273, 42 L. R. A. 305; Priewe v. Improvement Co., 93 Sis. 534, 550, 67 N. W. 918, 33 L. R. A. 645; Priewe v. Improvement Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904; Village of Pewaukee v. Savoy, 103 Wis. 271, 274, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859; Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. 185; Steel Co. v. Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402; Attorney General v. Smith, 109 Wis. 532, 85 N. W. 512. In McLennan v. Prentice, quoting from the opinion of Mr. Justice Field in Illinois Cent. R. Co. v. State of Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, the court said: 'The right which the state holds in these lakes is in virtue of its sovereignty and in trust for public purposes of navigation and fishing. The state has no proprietary interest in them, and cannot abrogate its trust in relation to them.' In Priewe v. Improvement Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645, and again in the same case in 103 Wis. 548, 79 N. W. 780, 74 Am. St. Rep. 904, it was held in effect, that the state has no interest in the beds of navigable lakes that it can treat the same as a subject for bargain and sale or grant the same away to private owners under the guise of police power or otherwise; that it is a mere trustee of the title thereto, under a trust created before the state

was formed, to which it was appointed as a trustee by its admission into the Union; that it has no active duty to perform in respect to the matter, or power over the same, except that of mere regulation to preserve the common right of all; that the limit of its power over the res is limited by the original purpose of the trust; that it is in effect, a mere trustee of an express trust, a trustee with duties definitely defined. Those principles are too firmly established to admit, at this late day, of being seriously questioned. It seems clear that if the state cannot sell the bed of a navigable lake, it cannot sell the waters thereof, or the fish therein, or the fowls that resort to its surface, or the ice that forms thereon. The rules that limit its right as to one of those matters, limit its power as to all."

And further on in the opinion, it is said:

"Since the whole beneficial use of navigable lakes is unchangeably vested in the people, every one within the state having the right to enjoy the same so long as he does not invade the like right of another, without any interference by claim of paramount right to the subject thereof, any law invading that individual possession is, in effect, an invasion of the right to liberty and property without due process of law, contrary to said Fourteenth Amendment. Any such invasion for the purpose of adding to the public revenues, exacting from a person for the benefit of the state, compensation for the enjoyment of a right which belongs to him and which he has a right to enjoy without paying therefor, violates section 13, art. 1, of the state constitution, prohibiting the taking of private property for public use without just compensation."

If then the State cannot "substantially impair" the public right of fishery and navigation and is bound to preserve the public waters so that the

people may be able to exercise these rights forever, it necessarily follows that the State could not set aside and reserve the navigable waters for the use of the Metlakahtlans and forbid the people to exercise therein their common right of fishery. By so doing the State would not only "substantially impair" but it would destroy and do away with that right altogether. It is not and cannot be material whether the public right of fishery is "substantially impaired" by granting the navigable waters or their bed to a railroad company, as had been done in the case of *Illinois Central Railroad Co. v. Illinois*, or by setting aside the navigable waters for the Metlakahtlans and excluding the public therefrom. The mischief does not lie in "substantially impairing" the public right of fishery in this or that manner, but the mischief lies in "substantially impairing" that right at all. The object of the law is not to protect the title of the State to the navigable waters but to protect the common rights of the people therein. If these public rights are invaded or "substantially impaired" the mischief is accomplished, and it is immaterial what means are employed to bring this about. The obligation imposed upon the State as trustee would not be satisfied if the State were to hold the title to the navigable waters for the use of the Metlakahtlans for, in the language of this Court, the trust "requires the Government of the State to preserve such waters for the use of the public" and, in the language of the Supreme Court of Wisconsin, the title is vested in the State in trust,

"to preserve to the people of the State forever the common rights of fishery and navigation." The trusteeship is inviolable. The State cannot substitute one beneficiary for another. The people, that is to say the public, are the beneficiaries of the trust and it is the duty of the State to so discharge its duties as trustees that they,—the public—can at all times and forever exercise their common rights of fishery and of navigation.

So also in the Territories, where the title to the navigable waters and their beds is held by the Federal Government in trust for the future State, the right of the whole people to exercise in such waters the common rights of fishery and of navigation exists as fully as it does in the States. These rights of the public are not affected by the question of whether the sovereignty vests in the State or in the General Government. They spring from and find their origin in the common law and exist regardless of whether the title is held by one sovereign or another. In either case the holding of the title is a governmental function, it is held by the sovereign not as a holder of private lands, but as a sovereign in trust for the whole people who have therein the common rights of fishery and of navigation.

The Circuit Court of Appeals, however, held that the doctrine herein contended for was at variance with the law as laid down by this Court in *Shively v. Bowlby,* 152 U. S. 1, *Manchester v. Massachusetts,* 139 U. S. 240. A careful examination of the opinions rendered in the last two mentioned cases will

disclose, however, that the Circuit Court of Appeals erred in this regard and that these cases not only harmonize with but fully support the legal principle contended for by appellant.

In the opinion rendered by *Shively v. Bowlby*, the Court makes this general statement:

> "The United States, while they hold the country as a Territory, having all powers both of national and municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters."

If this statement stood alone there might be some doubt as to what was meant by the Court or as to what were "appropriate purposes", which would authorize the United States in making the grants referred to. But this general statement is preceded by a specific enumeration of the instances in which such rights may be granted; that is to say, the Court had previously pointed out just what were and what were not appropriate purposes, and the general statement must therefore be considered as referring back to this specific enumeration of what are and what are not appropriate purposes.

The Court upon reviewing the decisions upon the question, found that there were some exceptions to the general rule frequently laid down in the decision of this court; that Congress could make no grants of lands lying below high water mark. The Court say:

> "Notwithstanding the dicta contained in some of the opinions of this Court already quoted, to the effect that Congress has no power to grant

> any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true."

The Court thereupon lay down the rule that in the Territories Congress exercises all the powers of government, both Federal and State, and proceed to enumerate the exceptions to the rule that Congress cannot make grants of land below high water mark in the Territories in the following language:

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations, and among the several States, or to carry out other public purposes appropriate to the object for which the United States holds the territory."

It is not a difficult matter to determine just what scope the Court intended to give to each of these exceptions, for they were based upon previous decisions of this Court and fully explained in the opinion itself so that nothing was left to conjecture.

The first exception relates to those cases where it becomes necessary to grant submerged lands in order to carry out international obligations; as when grants to such lands were made by a foreign sovereign having a right under the laws of such foreign sovereignty to make such grants, prior to the acquisition of the Territory by the United States. In relation to a grant of this character made

by Mexico prior to the treaty of cession the Supreme Court say: "That doctrine" (referring to the doctrine that the submerged lands are held in trust for the future State), "cannot apply to such lands as had been previously granted to other parties by the former Government:" *Knight v. Association*, 12 Sup. Ct. Rep., 258. So also fishery rights granted by the King of Hawaii, under laws permitting such grants, were recognized and protected after the cession of the Territory to the United States. But no question of this character can of course arise in connection with our dealings with the Metlakahtlans, whose rights, if any they have, were initiated long after Alaska became American territory.

The second exception arises out of the constitutional right of Congress to regulate commerce. This right exists, of course, both before and after the admission of the State. But this matter does not enter into our dealings with the Metlakahtlans.

The third exception relates to those cases in which it becomes necessary to grant submerged lands in order to "carry out other public purposes appropriate to the objects for which the United States held the territory." It is to be noted that the language does no authorize the granting of land below high water mark for all public purposes, but only for such public purposes as are appropriate to the objects for which the United States holds the territory; that is to say, such public purposes as do not interfere with the objects for which the territory is held. The answer to the question of what are the

objects for which the territory is held by the United States is given by the Court further on in the opinion, and the answer to the question of what are the public purposes, to which reference is made is found in the opinion of this Court rendered in the case of *Illinois Central Railroad Co. v. Illinois,* 146 U. S. 387.

After making the statement that the reasons why Congress never disposed of these lands under general laws are not far to seek, the Court proceeds to point out those reasons. The authorities, both English and American, are reviewed to show that the people have a common right of fishery and navigation in the navigable waters. The Court then proceeds to point out that in the Territories the Government holds the title burdened with a still further trust, in that the title is also held in trust for the future State. After so reviewing the law the Court say:

> "And the territories acquired from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States upon an equal footing in all respects; and the title and dominion of the tide waters, and the lands under them, *are held by the United States for the benefit of the whole people,* and, as this Court has often said, in the cases above cited, 'in trust for the future States.' "

The objects, therefore, for which the United States holds the title to the navigable waters in the Territories are to insure to the whole people the

rights of fishery and navigation in such waters, and to insure the transmission of the title so held to the future State when created. The rights of the people to a common right of fishery and navigation are not affected by the question of whether the title vests in the General Government or in a State. These rights exist in either case. The only difference being that in the case of the General Government the title is burdened with an additional trust, requiring it to transmit the title held by it as a sovereign, to be transmitted to the future State as soon as the future State acquires capacity to receive and hold it as a sovereign.

It still remains to be seen what public purposes there are that are appropriate to the objects for which the United States holds the territory; that is to say, what public purposes there can be that would authorize the sovereign to make grants of lands below high water mark, in view of the fact that these lands are held in trust for the use and benefit of the whole people. The answer is obvious. Whenever a grant of small tracts of submerged lands can be made to facilitate navigation or to aid in the conduct of the fisheries, the sovereign in making such grants does not invade the rights of the beneficiaries of the trust but adds to the value of such rights. And the question of whether or not the sovereign has the authority to make this or that grant or to confer this or that privilege in lands below high water mark, must in each case be made to depend upon the further question of whether or not the grant to be

made or the right to be conferred tends to add to the value of the public right or tends to destroy such right. If the former result follows, obviously the trust is not violated; if the latter follows, the public rights are invaded and the grant cannot lawfully be made or the privilege lawfully conferred.

In the case of the *Illinois Central Railroad Co. v. Illinois,* this Court held that grants of small areas such a might serve as foundations for wharves, docks and other structures that would serve as aids to navigation might be made, provided, that the public rights were not "substantially impaired" by the making of such grants. Of course, the making of a grant for a dock site would to some extent impair the right of fishery, and the test that was applied by the Court with reference to this matter was whether the rights would "substantially impair"; if not, the Court held the grant to be authorized.

In passing upon this matter Mr. Justice Field, speaking for the Court, said:

> "That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under the tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subject to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation

of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigatiton of the waters and in commerce over them may be improved in many instances by the creation of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. *It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power—consistently with the trust to the public upon which such lands are held by the State.* But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. *The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used to promote the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the im-*

*provement of the public interest, or which when occupied to not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled.* General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters if a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and preservation of the peace."

It will be observed from the foregoing that this Court held that the only grants of submerged lands that were appropriate to the objects for which lands were held by the State of Illinois, which were said to be to secure the public rights of fishery and navigation, were grants of such small areas as might serve for foundations for wharves, docks and other structures that might serve as aids to naviga-

tion. In this connection it was further held that no grant of submerged lands, however small the area, could be made that "substantially impaired" the public interests.

The principle applied by the Court in the case of the *Illinois Central Railroad Company v. Illinois* is applicable to the facts in this case. The title of the general government to the navigable waters in Alaska does not differ from the title of the State of Illinois to the navigable waters within its boundaries, except that the general government has the power, as has been pointed out, to make grants of submerged lands to carry out international obligations and to carry into execution its constitutional power in connection with the regulation of commerce. This follows from the fact that the general government has in the Territories all the power of government, both State and Federal, but it has no powers that are neither State nor Federal. The Constitution is in full force in Alaska (See *Rasmussen v. United States,* 197 U. S. 516). This being so, the general government cannot exercise arbitrary or unusual powers in the Territory even though it has the right to exercise all governmental powers, both State and Federal. The powers that it can exercise are those powers that in the States are reserved to the States by the Constitution or conferred by that document upon the Federal Government; that is to say, the power exercised must be either State or Federal. It follows that Congress could make no grants to the Metlakahtlans of an estate in fee for life, for years,

or at will, in the waters surrounding Annette Island; for whatever might be the character of the right granted, it would not only "substantially impair" but entirely destroy the public right of fishery. If a grant of submerged lands could not be made to the Illinois Central Railroad Company because it "substantially impaired" the public interest, it follows that a reservation which has precisely the same effect cannot be made. The mischief does not lie in the making of the grant but in the effect thereof, that is to say, the impairment of the public rights. What is true of the grant in this respect is true of the reservation. In either case the grant or reservation does no more than serve as the means by which the forbidden mischief is brought about. Indeed, if the Government sets aside the waters surrounding Annette Island for the exclusive use of the Metlakahtlans as a fishery, the very object of the reservation is the destruction of the public right. The underlying reason why the government, be it State or Federal, can neither grant nor reserve portions of the public waters to or for the benefit of the Metlakahtlans or any other individual or class, to be used as a fishery, is found in the fact that the fishery affected by the grant or reservation does not belong to the Government but to the people in common.

The question of whether Congress could grant the bed of a navigable stream in a territory as part of an Indian reservation was passed upon in the recent case of *United States v. Mackey,* 214 Fed., 146. The decision in this case was rendered under

and in the light of *Shively v. Bowlby.* It was contended by the Government that the ownership of the bed of the Arkansas River passed to the Creek Nation by a general grant of lands made to it in the patent executed by the Government to the Creek Nation, while Oklahoma was a territory, conveying to that nation all the tribal lands which the Creeks have since occupied in what is now Eastern Oklahoma, the Arkansas River having been included within the boundaries of the grant. But Judge Campbell held that the Court would take judicial notice of the fact that the Arkansas River was a navigable stream and that, being such, Congress had no power to grant it to the Creek Nation as part of a grant of lands made to furnish the Creeks with a home in the then far west. It was held that this grant did not come within any of the exceptions pointed out in *Shively v. Bowlby* to the general rule that Congress had no power to grant submerged lands underlying navigable waters in the Territories. The objects of this grant were thus stated by the Court:

> "It is familiar history that the purpose of this grant to the Creeks was to provide them a country west of the Mississippi to be taken and occupied by them in lieu of the lands formerly occupied by them, which they could no longer occupy in peace because of the encroachment of white settlers, and the friction incident thereto. It was to provide a home for this tribe in the then far west."

Judge Campbell then holds that a grant of the bed of the Arkansas River for this purpose, was

not performing any international obligation and was not to affect the improvement of such lands for the promotion or convenience of commerce, and was not to carry out any other public purpose appropriate to the objects for which the United States held the Territory.

The case was reversed on appeal on the ground that the Court erred in taking judicial notice of the fact that the Arkansas River was navigable at the point in question. The Circuit Court of Appeals, therefore, approved of the law as laid down by Judge Campbell with reference to the inability of Congress to convey navigable waters for the purpose of an Indian reservation. Had the Circuit Court of Appeals not taken the same view of this matter that Judge Campbell did the case would not have been reversed on the ground that the Court erred in taking judicial knowledge of the fact that the Arkansas was navigable, for that fact would have been immaterial, but on the ground that the bed of the river passed as a part of the grant without reference to its navigability.

So also in the case of *Illinois Steel Co. v. Bilot*, 83 Am. St. Rep. 909, the Supreme Court of Wisconsin say:

> "The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high water mark, within the boundaries of the State, becomes vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters

of such lakes, ponds and rivers, to the same extent that the public are entitled to enjoy tidal water at the common law. *A patent from the United States, so far as it purports to convey any of such lands, whether made before the State was admitted into the Union or thereafter, is ineffectual.*"

It will be observed from the foregoing that the views expressed in *Shively v. Bowlby* are, when the various portions of the opinion are considered together and in the light of the previous decisions of the Court upon which they are based, in exact accord with the other decisions of this and those of the State courts, and fully support appellant's position. It will also be observed that the Courts of the Eighth Circuit have placed upon the language employed in *Shively v. Bowlby* a construction in harmony with the views here expressed.

The Circuit Court of Appeals also cite the case of *Manchester v. Massachusetts*, 139 U. S. 240, in support of the conclusion arrived at by the court and against the contention made by appellant. The decision in that case also is in complete harmony with the views here advanced. The State of Massachusetts in regulating the manner in which the fisheries should be carried on in Buzzards Bay provided against the use of purse seines. There was no attempt on the part of the Massachusetts Legislature to create for the benefit of any one or more persons a monopoly or an exclusive fishery in the waters of Buzzards Bay, but the fisheries were left open to all upon equal terms. The State merely adopted a

regulatory measure under which purse seines could not be used. This Court held that the State of Massachusetts had a right to regulate the fisheries, and sustained the validity of the Statute.

There can be no doubt about the correctness of this decision. It has always been held that the *jus regium*,—that is to say, the right to regulate the fisheries,—resides in the State. It is a right that the State exercises as has already been shown, in order to make the fisheries more valuable to the people. In the exercise of this right the State may provide what devices may and what devices may not be used and how they shall be used. Congress has exercised this right with reference to the Alaska fisheries by providing how fish-traps, seines and other fishing devices shall be used. And this Court very properly held that the State of Massachusetts possessed this right. Not only did the Court hold that the people did not possess the common right of fishing in Buzzards Bay, but it was expressly stated that no opinion was expressed upon that subject but that the decision was based upon the point that the law passed by the Massachusetts Legislature was a proper, impartial, regulatory measure. In the course of the opinion, it is said:

> "If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States (upon which we express no opinion), the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a State may well be permitted to regulate within its

territory, in the absence of any regulation of the United States."

This opinion is in exact accord with the opinion expressed in *Illinois Central Railroad Co. v. Illinois*, where Mr. Justice Field, in speaking for this Court, says:

"The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney in Martin v. Waddell 16 Pet. 367, 410: 'When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' In Arnold v. Mundy, 6 N. J. Law, 1, which is cited by this court in Martin v. Waddell, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made 'with great deliberation and research,' the Supreme Court of New Jersey comments upon the rights of the State in the bed of navigable waters, and, after observing that the power exercised by the State over the lands and waters is nothing more than what is called the '*jus regium*,' the right of regulating, improving, and securing them for the benefit of every individual citizen, adds: 'The sovereign power itself, therefore, cannot, consistently with the principles of

> the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the States, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.' "

That the State has the right to regulate the fisheries cannot be doubted. The object of such regulation is to make the public right of fishery more valuable. In connection with the exercise of this right the State government may, in many instances, confer some private advantages upon individuals who, under the supervision of the State, do something to add value to the public right.

Thus, in many of the Eastern States it was found that oysters would grow if planted in beds that did not naturally produce them. Accordingly, it became a great advantage to encourage the planting of oysters in such beds and thus add to the output of the oyster fisheries. Individuals would not be warranted in planting oysters if they were not secure in the right to harvest them. Accordingly, it has been held that in connection with the right to regulate the oyster fisheries the State may allot oyster beds to individuals with the view of enabling such individuals to plant oysters therein and harvest the oysters so planted; and further, it has been found that the waters of many of the streams would produce fish not found therein. Accordingly, special privileges have in the State of Massachusetts especially, and probably in some other States also, be extended to

persons planting new varieties of food fish in streams and ponds.

The fact that the State may in certain instances, such as have just been mentioned, grant temporary privileges to those who do something to add to the public right of fishery, has led textbook writers, such as Farnham on "Waters," and Gould on "Waters," to make the general statement that the sovereign has the power to grant an exclusive right of fishery, in the sense that persons adding to the public right in the manner indicated may be granted the exclusive right to harvest the oysters planted by themselves, or enjoy temporarily, exclusive privileges in connection with the fishing of waters stocked by them with new species of fish. Private fisheries may be granted in this country but this can only be done in connection with the right of regulation, and when the result thereof is to add to the public right and make it more valuable. The sovereign cannot reserve or set aside a private fishery for the use of any person or class with the view of granting to such person or class an exclusive privilege and excluding the public therefrom. That this is what is meant by the authors mentioned is clearly evident from the cases cited by them in support of the proposition named.

The first case cited by Farnham is *Commonwealth v. Weatherhead,* 110 Mass., 175. This case refers to a right to fish in a pond by one who had planted a new species of fish in the pond under a statute giv-

ing such a one a special right as a reward for improving the value of the right of fishery.

The second case cited is *Rowe v. Smith*, 48 Ct., 444. The decision in this case relates to a statute regulating oyster planting. Under it, the shore is allotted to individuals for purposes of planting oysters and the act gives to such individuals the right to harvest the oysters so planted.

The case of *Commonwealth v. Vincent*, 108 Mass., 441, is the first case cited by Mr. Gould in his work on "Waters." This case deals with the statute giving those planting new varieties of fish special privileges to limited areas in waters not tidal.

In connection with the review of these Massachusetts cases, it is interesting to note what the Massachusetts courts have held upon the question now presented. In the case of *Weston v. Sampson*, 62 Mass., 351, it was recited by the Supreme Court of Massachusetts that while under the colonial ordinances of Massachusetts an upland owner owned the tide flats, the public, nevertheless, had a right to go upon these tide flats for the purpose of exercising their common right of fishery, insofar as such flats were not actually covered by wharves or other improvements of that character, and that this right of the public included not only right to catch floating fish but also to dig oysters from the soil itself.

In speaking upon this question, Chief Justice Shaw, who delivered the opinion of Court, says:

> "There is no doubt, that by the common law of England all the subjects of the King have a

common and general right of fishing in the sea, and in all bays, coves, branches and arms of the sea, which in general is held to extend to all places where tide ebbs and flows. The general rule is expressed by Lord Hale, *De Jure Maris, Hargr. Law Tracts, II,* that all the people of England have a liberty of fishing in the sea, as of common right, and of this they cannot be lawfully deprived, even by the grant of the King."

Again it is stated:

"And it has been frequently held, that the King takes this right of soil in trust for the public, so far as the fishing is concerned; and although the King may grant away this right of soil to another, yet his grantee will take it subject to the same trust; and by such grant, however comprehensive in its terms, the public, that is, the King's subjects, cannot be deprived of their common right."

Chief Justice Shaw further holds that if exclusive rights of fishing exist in an arm of the sea, they must be proved by ancient grant and that they cannot be founded if made within the time of memory, and cannot be sustained if made within the time of memory, and that such rights could not be conferred by grant under Magna Charta.

### Proclamation of the President

The Proclamation reads as follows:

"Whereas, it is provided by section fifteen, of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled 'An Act to Repeal Timber Culture Laws, and for other purposes,' that 'Until otherwise provided by law, the body of lands known as Annette

Island, situated in the Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's Entrance, be, and the same is hereby set apart as a reservation for the use of the Metlakahtlan Indians, and those people known as the Metlakahtlans, who have recently emigrated from British Columbia, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior'; and

"Whereas, the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

"Whereas, it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery;

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States of America, do hereby make known and proclaim that the waters within three thousand feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island, and the adjacent rocks and islets located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of the said islands, rocks and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands, to be used by them under the fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the City of Washington this 28th day of April, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and fortieth."

In determining the validity and effect of the foregoing Proclamation it becomes necessary to inquire into its character and purpose.

After reciting the Act of Congress setting apart Annette Island for the use of the Metlakahtlans, the preamble makes the statement that the Secretary of the Interior is desirous of placing a cannery in operation on the island and that it is therefore necessary that the fishery in the contiguous waters be reserved for the purpose of supplying fish and other aquatic products for this cannery. The Proclamation then proceeds:

"Now, therefore" (that is to say for the reasons stated), "I, Woodrow Wilson" etc., "do hereby make known and proclaim that the waters within three thousand feet from the shore at mean low tide of Annette Island" etc., "are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them as residents of these islands, to be used by them under the fisheries laws and regulations of the United States as administered by the Secretary of Commerce. Warning is hereby expressly given to all unauthorized persons not to fish in or use

any of the waters herein described or mentioned."

The effect of the Proclamation then, if valid, is simply to create an exclusive fishery in the waters mentioned for the benefit of the Metlakahtlans. The reason assigned for this action is that it was deemed necessary to create this exclusive fishery in order to supply fish for the Metlakahtla cannery.

While the reason assigned loses all its force in view of the fact that the Metlakahtlan Indians operated this cannery for many years without the enjoyment of an exclusive fishery, and would be operating it now were it not for the indiscreet action on the part of the Board of Education, and in view of the further fact that the cannery itself is no longer in the control of the Metlakahtlans, but has been leased to a white man, it clearly indicates that the object of the proclamation was to create a private fishery, and the further statement in the Proclamation that the waters mentioned are reserved for the benefit of the Metlakahtlans, etc., to be used by them under the fisheries laws and regulations of the United States, and the warning given to others not to fish in any of those waters, clearly indicates that the Proclamation can have no other effect.

It has already been pointed out that the Government holds the navigable waters in trust for the whole people, who have therein certain rights in common, including the right of fishery, and that the Government being the mere trustee has no right to invade the rights of the people, the beneficiaries of

the trust, either by disposing of the public waters or by taking any other action that would exclude the public therefrom and thereby impair or destroy the rights of fishery or navigation. The only right that the sovereign has in the navigable waters, so far as the fisheries are concerned, is the right of regulation, which is a governmental right which is lodged in and exercised by the sovereign, with a view of making the right of fishing more valuable to the whole people. The adoption of regulatory measures, whether with reference to the fisheries or any other matter whatsoever, is clearly a legislative function which can be exercised under our Constitutiton by Congress alone and not by the executive. Congress, as has been pointed out, has already adopted many regulatory measures with reference to the Alaska fisheries, and its right to do this is undoubted.

While it must be conceded that the Government has the undoubted right to regulate the fisheries, provided such regulation is the result of legislation, the fact must not be lost sight of that this Proclamation is not a regulatory measure and would not be such even if enacted by Congress. Its effect is not to regulate the fisheries. Its purpose is not to make the fisheries more valuable to the public. Under it the fisheries are not to be regulated at all; the Metlakahtlans are to have an unrestricted right to fish, subject only to the general laws regulating fisheries, and all persons not Metlakahtlans are to be denied that right. The object and effect of the

Proclamation is to grant to the Metlakahtlans monopolistic fishing rights in the waters affected and to destroy the public right of fishery therein. The fishery created under this Proclamation does not differ in any respect from the fisheries created by the Norman kings, provided against by Magna Charta. What right then has the President by executive Proclamation to create such a fishery?

The Circuit Court of Appeals held that the President had such a right and based their decision upon the authority of the case of the *United States v. Midwest Oil Company*, 236 U. S. 459. But the case is not in point. It may be conceded that the President, notwithstanding the Constitutional provision, that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," may withdraw from entry and settlement portions of the public lands, without in anywise conceding that the President may reserve for the exclusive use of the Metlakahtlans a fishery in the public waters of the United States and exclude from such fishery the people at large who are the co-owners with the Metlakahtlans in the fishery. From whence does the President derive the power to take the property of the people at large and give it to the Metlakahtlans? Our Constitution provides against the taking of property without due process and against the taking of property for public purposes without compensation, and nowhere does it confer upon the executive any special powers

in this regard with reference to the public navigable waters or the fisheries therein contained; and the common law, in the light of which the Constitution must be considered, recognized no such right in the executive.

As has already been pointed out, in ancient times the King of England exercised this power, but the people of England regarded this as a usurpation and an invasion of their rights. Indeed, they regarded the common right of fishery as a right so valuable and sacred that its violation was provided against by an express provision in Magna Charta.

Since Magna Charta, no exclusive fisheries have been created in England and it is settled law that the King has since that time had no power to create them (*Arnold v. Mundy.*) In this connection it must be remembered that the inhibition contained in the great Charter is against any interference with the public right, that is to say, the common right of fishery which each individual citizen has a right to enjoy. Any interference, whether by grant, reservation for the use of Indians, or otherwise, is prohibited. As was said by the Court in *Arnold v. Mundy*:

> "And whatever diversity there may be found in the books, with respect to the different kinds of fishery, it can no way affect the operation of the Charter in this respect, because that forbids all manner of fencing in, or shutting, fisheries against the common use."

In the case of *Midwest Oil Company v. United States,* the Court dealt with the validity of an

executive order withdrawing a portion of the public lands held by the United States as a land-owner.

The public lands of the United States are the property of the United States. With these the Government can do as it pleases, for in them no one other than the Government has any interest. Anyone going upon the public lands without express authority from the Government becomes a naked trespasser, who may be ejected at will. There may be no special object to having portions of these lands set aside by the President for this or that public use. Such action may serve a useful purpose and it cannot injure anyone for no one is deprived of any rights that he had before the action was taken.

Not so when the navigable waters are set aside for the exclusive use of some person or class of persons. The navigable waters are not the sole and absolute property of the United States as are the public lands. By virtue of sovereignty the United Statets holds the title to the navigable waters, but this title is burdened with a trust in favor of the people. Each individual citizen has in these waters a common right of fishery and navigation, and as was held in the case of the *Illinois Central Railroad Co. v. Illinois,* it is the duty of the sovereign, holding the title, to preserve these waters so that these rights of the people may be enjoyed. That an executive proclamation which does away with these rights of the public altogether and forbids their enjoyment is not consistent with the trusteeship under which

the title is held, is so very evident as to require no discussion. And that such a Proclamation differs widely from a Proclamation which violates the rights of no one is equally evident. Clearly the right to issue the latter cannot serve as a basis for the right to issue the former. In one case the Government deals with that which is its own—the public lands; in the other it deals with that which is not its own—the right of fishery, which is the common property of each and all citizens alike.

The fisheries in the navigable waters do not belong to the Government but to the people at large. The Government has no interest therein which it can set aside or reserve for the use of any individual or class of individuals. The Government holds the title, it is true, but it holds this title in trust for the whole people who have in the navigable waters affected the common right of fishery and navigation. Any action on the part of the Government which prevents the whole people from enjoying either the common right of fishery or that of navigation is inconsistent with the exercise of that trust, which, in the language of the Court in *Illinois Central Railroad Company v. Illinois*, "requires the Government of the State to *preserve* such waters for the use of the public." The language of the Supreme Court is clear and explicit, under it the duty of the Government is not fulfilled if it preserves the waters for the Metlakahtlans or for any other special class, but it must preserve them "for the use of the public." Any act of legislation, or executive Proclama-

tion, therefore, that has the effect of excluding the public from the use of navigable waters, is a clear violation of the trust.

The only case, so far as can be learned, in which the validity of an executive Proclamation reserving a portion of the navigable waters was ever passed upon, is the case of *United States v. Ashton*, 170 Fed. 509. In that case, President Pierce had set aside an Indian reservation so as to include within its boundaries navigable waters, and it seems that President Grant subsequentlty extended the reservation with like effect. The Court held that the President could not by executive Proclamation include lands below high water mark within an Indian reservation. In the course of the opinion, it was said, on page 512:

> "The Oregon country was acquired by the United States, with the object in view of creating new States to be admitted into the Union upon an equality with the original States, and until the States now existing within that country were organized and admitted into the Union, the National Government held the title to the shores and beds of navigable waters therein, as trustees for the future States. *Pollard v. Hagan*, 3 How., 212, II. L. Ed. 565. If there is any exception to this general rule, it must rest upon a special grant expressly authorized by a law enacted by Congress to provide for some peculiar requirement of the National Government. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331."

Again on page 517, it is said:

> "Any disposition of proprietary rights in the seashore by the Government of the United

States, being obnoxious to the firmly established principle that control of the seacoast is an attribute of sovereignty appertaining to the States, could only be valid, if valid at all, by virtue of the exercise of the power vested in Congress to be exercised for the national welfare, and there is no pretext set forth in the bill of complaint or stated in the argument of the complainants' solicitors that any proprietary right to shore lands became vested in the Puyallup Tribe as a community by virtue of any provision, expressed or implied, of any act of Congress whatever. The treaty of 1854 was not in any sense a conveyance of title to any of the lands in controversy to the Puyallup Indians; on the contrary, the treaty was relinquishment by said Indians of whatever rights to these lands may have been theretofore claimed by them. For the reasons already stated, the President could not grant shore lands by the making of an executive order designating the tract of land to be held as a reservation."

There is, however, one further objection to the validity of the Proclamation setting aside the waters surrounding Annette Island for the use of the Metlakahtlans.

Congress, in order to preserve the Alaska fisheries for the use of our own people, passed an act prohibiting aliens from fishing in the waters of Alaska. Section 254 of the Compiled Laws reads as follows:

"That it shall be unlawful for any person not a citizen of the United States, or who has declared his intention to become a citizen of the United States, and is not a bona fide resident therein, or for any company, corporation, or association not organized or authorized to transact business under the laws of the United States or under the laws of any State, Territory

> or district thereof, or for any person not a native of Alaska, to catch or kill, or attempt to catch or kill, except with rod, spear, or gaff, any fish of any kind or species whatsoever in any of the waters of Alaska under the jurisdiction of the United States."

Under the provisions of this section aliens are prohibited from fishing in the waters of Alaska, and the Metlakahtlans, being natives of British Columbia, are, of course, aliens (see Act of Congress relating to Annette Island reservation above quoted. See ev. Hanford, Rec., page 171 *et seq.*). An exception is made in favor of the natives of Alaska. But the Metlakahtlans being natives of British Columbia do not come within the exception. While fishing with rod, gaff and spear is not prohibited, the waters surrounding Annette Island are deep waters, not adapted to that kind of fishing (see map of Annette Island, Rec. page 178; evidence Burkhardt, Rec., page 116.)

Here then we have a proclamation setting aside a private fishery for the use of a tribe of British Columbia Indians, who cannot make use of the fishery so set aside for them without committing an offense against the United States. And while the Proclamation and Act of Congress refer to other natitves who may associate themselves with the Metlakahtlans the evidence is that the population is still composed of Metlakahtlans (see affidavit Reagan, Rec. 74).

It will not be contended that the President can by proclamation set aside an Act of Congress; nor

will it be contended that he can in this manner make that lawful which an express act of Congress makes unlawful. This being true a Proclamation having this effect is necessarily inoperative. If the object for which the Proclamation was issued is such that it cannot be accomplished, it must follow that the Proclamation becomes ineffectual. No one would contend that the public should be prevented from exercising their common right of fishery for no purpose whatever. It is undoubtedly true that the attention of the President was not directed to this section, and equally true that the heads of the Bureau of Education having this matter in charge overlooked this section, but this cannot alter the situation. The Act of Congress was on the statute books and it must be given effect in determining the validity of the Proclamation.

**The Right to Construct and Maintain a Fish-Trap.**

The Circuit Court of Appeals took the position that one constructing or maintaining a fish-trap in the navigable waters of Alaska was a naked trespasser and that the fish-trap itself was a *purpresture,* basing its decision upon the case of *Webber v. Harbor Commissioners,* 18 Wallace, 65. In the course of the opinion in that case the following language is employed:

> "Nor is it necessary to controvert the proposition that in several of the States, by general legislation or immemorial usage, the proprietor whose land is bounded by the shore of the sea, or of an arm of the sea, possesses a similar

> right to erect a wharf or pier in front of his land, extending into the waters to the point where they are navigable. In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those States where the common law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is in England, in the King, and, in this country, in the State. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a *purpresture*, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

This was undoubtedly a correct statement of the law as applied to the facts in the case then before the Court. But the public right of fishery was not then under consideration. The decision in the case of *Webber v. Harbor Commissioners* was written by Mr. Justice Field, who at a later date also wrote the opinion in the case of the *Illinois Central Railroad Company v. Illinois*, 136 U. S. 387. Clearly, the language employed in the case of *Webber v. Harbor Commissioners* must be read in the light of the subsequent opinion also rendered by Mr. Justice Field. In the latter case, as has already been shown, it was held that while the sovereign held the title to the submerged lands, it held this title as a mere trustee for the benefit of the people at large, each one of whom had in the navigable waters the common rights of fishery and navigation.

Another fact must not be lost sight of, and that is

that even under the decision in the case of *Webber v. Harbor Commissioners,* a structure, whatever it may be, is not a *purpresture* unless constructed without license or permission from the sovereign.

The case of *Webber v. Harbor Commissioners,* therefore, is distinguishable from the case at bar for two reasons. In the first place, the fish-trap in questiton in this case was constructed under and in compliance with an express Act of Congress recognizing and regulating the right of constructing and maintaining fish-traps in the navigable waters of Alaska, and for that reason the trap was constructed under license from the sovereign, and being constructed under such license was not a *purpresture.* And in the second place, it is contended that the trap in question was constructed by the appellant in connection with the exercise of its common right of fishery; that it is a device ordinarily and usually employed in connection with the exercise of that right, and, that the right of fishery carries with it the further right to use and employ such appliances as are necessary to the enjoyment of the right.

The record shows that the officers and agents of the Alaska Pacific Fisheries made observation in the Spring of 1915 with a view of ascertaining the course followed by the incoming schools of salmon, in order to determine whether the present site of the appellant's fish-trap would be valuable for the location of such a trap. These observations covered a considerable period of time and in the month of August, 1915, it having been determined that the

site would be a favorable one for a fish-trap, a diver was employed, with a view of examining the bed of the ocean at that point so as to determine the further question of whether it would be feasible and practical to drive a trap there (see evidence, Burckhardt, Rec., page 86). After so determining that the bed of the ocean was such that a trap could there be driven, arrangements were made to procure the necessary piles and the cannery at Chomly was enlarged by constructing new buildings and adding new machinery, so as to be able to can the increased supply of fresh salmon that would come from this trap. In so increasing the capacity of the cannery eighteen thousand five hundred ($18,500.00) dollars were expended (see evidence, Burckhardt, Rec., page 114). The Chinese contracts were made to put up this additional pack at the Chomly cannery and the tin and other supplies necessary in that connection were purchased, so that a failure to operate the trap would result in a loss to appellant of fifty thousand ($50,000.00) dollars in a single year. All this was done in the Fall of 1915 and the Winter of 1915-16 (see evidence, Burckhardt, Rec., page 89 *et seq.*)

Along about the middle of March, 1916, the President of the appellant company carried on a correspondence with the Assistant Secretary of the Interior, in relation to the leasing of the Metlakahtla cannerey to Mr. Harris, and his representative in Washington was then informed that because of the opposition of Secretary Redfield no special fishing

privileges would be granted to the lessee of the Metlakahtla cannery—that the waters were to be left open and that no one was to receive any special fishing privileges (see evidence, Burckhardt, Rec., pp. 118-119).

After being so informed and as soon as the weather was suitable, preparations were made to drive the trap, and on the 7th day of April the work in this connection was actually commenced, with the result that on the 18th day of April the driving of the trap was completed (see evidence, Burckhardt, Rec.; affidavit of Jenkins, Rec. p. 152; also affidavit of Copeland, Rec., p. 153, and Second Finding of the Court, Rec., p. 188). The trap was completed at the expense of approximately four thousand ($4,000.00) dollars.

There is some dispute in the evidence upon the question of whether the webbing was hung at that time, or whether the hanging of the webbing was delayed until the fishing season commenced, but this is quite immaterial, as the hanging of the webbing is a mere incident to putting the trap in fishing condition. After the trap was driven and completed on the said 18th day of April, the Proclamation of the President was issued. The Proclamation is dated April 28, 1916.

The record shows and the Court found that the trap of the appellant is an ordinary fishing device such as is ordinarily and usually employed in catching salmon in the waters of Southeastern Alaska by those engaged in the fishing business (see evi-

dence, Burckhardt, Rec., pp. 99-100, and Second Finding of the Court, Rec., p. 188).

Under this state of facts, appellant's fish-trap is not a purpresture. Its construction and maintenance was recognized, sanctioned and regulated by express Act of Congress, in full force at the time the trap was constructed. The Acts of Congress referred to are Sections 261 and 262 of Chapter 3 of the Compiled Laws of Alaska, which are as follows:

> "Sec. 261. That it shall be unlawful to erect or maintain any dam, barricade, trap, fish-wheel or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any red-salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed."
>
> "Sec. 262. It shall be unlawful to lay or set any drift net, seine, set net, pound net, trap, or any other fishing appliance for any purpose except for purposes of fish culture, across or above the tide waters of any creek, stream, river, estuary, or lagoon, for a distance greater than one-third the width of such creek, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red-salmon stream where the same is less than five hundred feet in width. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing

> appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance."

It is contended in the second place that the fish-trap in question is not a purpresture, because it was constructed and maintained in connection with the exercise of appellant's common right of fishery.

That the appellant had a common right of fishery in the navigable waters of the United States where the trap is now situated prior to and at the time its fish-trap was constructed cannot be denied. And since it had such a right it follows that it had the right to employ, use and install any suitable device necessary to the enjoyment of the right. The Legislature having the right to regulate the exercise of the rights of fishery and navigation may pass regulatory measures forbidding the use of such devices as in its judgment are destructive of the common right, either of navigation or fishery, or it may prescribe the manner in which this or that device may be used with the view of promoting the common rights of navigation and fishery, but in the absence of any legislation upon the subject any device whatever may be employed, at least so long as navigation is not obstructed.

This matter was before the Supreme Court of the State of Michigan in the case of *Lincoln v. Davis*, 53 Mich., 375; 51 Am. Rep., 116. In that case the

plaintiff, who was a fisherman, had, in the language of the opinion

> "caused stakes to be driven in Thunder Bay, commencing about a mile east of Sulphur Island and thence continued eastward for a distance of about 160 rods for the purpose of affixing thereto trap nets for fishing."

It will be observed that the appliance there used was in all respects similar to the fish-trap of the appellant. The defendant in the case under discussion had taken up and removed these stakes. The plaintiff brought trespass and recovered. On appeal the judgment was affirmed. In the course of an opinion by Judge Campbell, concurred in by Judge Cooley, it is said:

> "Outside of the statutory line I think there can be no doubt of the right of any one to fish with such appliances as are appropriate to open-water fishing. It has always been customary on these lakes to treat deep-water fishing and navigation as resting on the same basis, except in narrow waters or near shore, where fixed apparatus must have some relation to riparian occupancy as used in connection with it. Fishing such as was involved in this controversy has no natural connection with the dry land or its approaches. It is carried on altogether by the aid of vessel or boat navigation, and is fairly incidental to that class of business."

In this connection, let it be said that it is contended on the part of the appellant, not only that the appellant in constructing its fish-trap was not a trespasser, but that since it was acting within rights conferred upon it by the common law and expressly

recognized and confirmed by statute, the fish-trap when constructed became a vested property right, so that the Proclamation when issued invaded not only appellant's right of fishery, which, under the decision in this Court in *McCready v. Virginia*, 94 U. S. 391, is a property right, but also the vested rights of the appellant in the fish-trap itself as property.

Not only has one who acquires property in a lawful manner and while in the exercise of a lawful right a vested right in such property in accordance with the general principles of law and the dictates of sound reason, but where one expends labor and money in the erection of fixed fishing appliances in the navigable waters, or has otherwise fitted a place in such waters for profitable fishing, such a one is entitled to protection in the enjoyment of the thing upon which such labor and money have been expended, as long as he continues in possession and occupation.

*Farnham on Waters*, Sec 394;
*Lewis v. City of Portland*, 35 Pac. 256;
*Pitkin v. Olmstead*, 1 Root, 217 (Conn.);
*Lay v. King*, 5 Day, 72;
*Gallup v. Tracy*, 25 Conn. Rep., 10;
*Post v. Kreischer*, 8 N. E., 365;

In *Farnham on "Waters,"* page 394, it is said:

> "Every individual has the right to enjoy the public right and since no two individuals can enjoy precisely the same right at the same time, some rule must be observed as to the order in time in which the rights shall be exercised. In some instances this is regulated by custom. No person can acquire a right of fishing in a public

> fishery superior to any other, unless he has gone into the common waters and set up and established his pounds and stakes and taken possession of the line which those pounds and stakes included, with which a stranger can not directly interfere. . . . When labor is necessary to fit a certain place for profitable fishing, the one bestowing that labor is entitled to protection in this enjoyment as long as he continues in possession and occupation."

In the case of *Pitkin v. Olmstead*, 1 Root, 217, it was held that where one in the exercise of his common right of fishery cleared a portion of the bed of a navigable river, he had a right to occupy and use the portion so cleared and improved during the fishing season. Upon that question the Supreme Court of Connecticut say:

> "The river being a public navigable river, it is for all the citizens to navigate their vessels in and to draw seines for the purpose of taking fish—that the bed of the river is the private property of no one but remains as public as the waters that flow in it—whoever therefore by labor and expense clears a fish place in its bed acquires a right to occupy and enjoy it in preference to any other and by long continued possession and occupation in the proper sense the right is strengthened and confirmed; and the defendants had no right to disturb or interrupt the plaintiff in the exercise of their right in their own proper fishing place so long as they did not go upon their land."

And in the opinion in the case of *Lay v. King*, *supra*, it is said:

> "Where a man by labor and expense makes a fishery without obstructing or infringing upon

> previously existing rights, he ought to be protected in the enjoyment of it."

The case of *Gallup v. Tracy* arose under a statute of the State of Connecticut entitled, "An Act for encouraging and regulating fisheries," which permitted every inhabitant to plant oysters in any of the navigable waters of the State, and with the consent of a committee appointed for that purpose by the town in which the same should lie, to mark, stake out and enclose the ground on which such oysters were planted. A party staking out such ground and planting such oysters was held to have acquired a vested right in the oysters planted and to the occupation of the place where they had been planted of which he could not be deprived by a subsequent repeal of the statute giving the right. In passing upon this question the Court say:

> "We think the plaintiff had acquired a vested right in the oysters which he laid down and to the occupation of the place where he laid them down."

In the case of *Post v. Kreischer*, 8 N. E. 365, it was held that under the common law oyster fishermen had in connection with the exercise of the right of fishery a right to plant oysters in the bed of navigable waters and mark out the spot where the oysters were planted, and that upon so doing they acquired a right to the oysters produced within the area marked. This case arose in the State of New York and it will be observed that the Supreme Court of New York holds that a person planting oysters

in the navigable waters and marking the area within which the oysters were planted, has the same right at common law that was conferred upon a person taking similar steps by the Connecticut statute considered in the case of *Gallup v. Tracy, supra.* In passing upon this question, the Supreme Court of New York say:

> "The authorities sustain the proposition asserted by the plaintiff that by the common law oysters planted in a bed clearly marked out and defined in the tide waters of a bed or arm of the sea, which is a common fishery to all the inhabitants of the State where the bed or arm of the sea is situate, where there are no oysters growing spontaneously at the time are the property of the person who plants them and the taking of them by another is a trespass for which an action lies.
>
> The planting of oysters in tide waters and the right of property in the person planting them is not regarded as an exclusive appropriation of the right of fishery common to all the inhabitants of the State, but as a legitimate exercise of the common right not inconsistent with its reasonable enjoyment by others."

In the case of *Lewis v. City of Portland, supra,* the same legal proposition presented by the case at bar was before the Supreme Court of Oregon. Under the laws of the State of Oregon riparian owners had the right to construct wharves into the streams by which their land was bounded. A riparian owner in the City of Portland had constructed a wharf in aid of navigation and after the wharf had been constructed, the Legislature passed an act authorizing the City of Portland to construct a

bridge across the river at a point and in a manner that would greatly damage the plaintiff's wharf. It was held by the Supreme Court of Oregon that this was an interference with a vested right, and that the wharf built could not be taken without the payment of compensation. In passing upon this, the Supreme Court of Oregon say:

> "The statute simply grants permission or license to any upland owner in an incorporated town whose land fronts upon a navigable stream to construct a wharf in front of his land, which permission, when acted upon, render his wharf a legal structure. Its object is to encourage the building of wharves to aid navigation, and for the benefit of commerce. Within its purport, then, what difference would it make whether the wharf was built before or after the statute was enacted? In either case, the wharf would serve the object it sought to accomplish, and hence be a legal structure within its spirit and intent. But it is argued that the leave granted under the statute, being merely a permission or license, is revocable at the pleasure of the State; and that, as a consequence, the wharf of the plaintiff ceases to be a legal structure, or to have a legal existence, when the leave is withdrawn or the license revoked. The statute has not been repealed, either directly or by implication, and, so far as it is concerned, there is no revocation of the license granted. The most that has been claimed for the Meussdorffer Act in that connection is that it—being for a public purpose—operates to revoke the license of the plaintiffs, and thereby to deprive their wharf of its legal foundation and existence. It will be observed, then, that the argument is based upon the theory that the permission granted by the statute to build a wharf is merely a license, and, as such,

may be revoked at the pleasure of the State, after it has been acted upon, and the wharf erected. But this is not so. As was said in *Bowlby v. Shively, supra,* the statute does not vest any right until exercised. It is a license revocable at the pleasure of the Legislature until acted upon and availed of. It is doubtless true that, if the statute should be repealed, or the adjacent tide lands disposed of, the privilege given the upland owner to build a wharf across the tide lands into deep water, unless acted upon or availed of, would be revoked. But the riparian owners who have taken advantages of the permission or privilege to build wharves—especially those on fresh navigable waters, for the reasons suggested—have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor. Hence the contention of the defendants that the Meussdorffer act—which authorizes the location and construction of the Burnside street bridge, and under which they are proceeding to build it—is a revocation of the leave or license, cannot be maintained. Nor do we find anything in the case of *Illinois Cent. R. Co. v. Illinois, supra,* in conflict with this result. There the grant of the submerged soil of the lake was in such quantity as, in the opinion of the Court, impaired the public interest in its waters, and operated, if irrepealable, as abdication by the State of its trust over the property. The right of a riparian owner to build a wharf over the submerged soil of a river to navigable water is not inconsistent with the public interest, nor in prejudice of the public rights. Nor does the grant of such subjacent soil or tide lands subject to the paramount right of navigation and commerce authorize its use for any purpose inconsistent with the public

interest. The land in front of the riparian owner, when used for a wharf, and under proper regulation, is in aid of navigation and for the benefit of commerce. Of course, the State has the right to regulate the building of wharves, or to determine how far rights in submerged soil can be exercised consistently with the easement of navigation. Our State has made such regulations and, as there is no claim that the wharf of the plaintiffs impedes navigation, or is not erected in conformity with its requirements, it must be regarded as a legal structure, and entitled to be protected as private property. Although the evidence shows that the original wharf was torn down and rebuilt in the year 1876, in conformity with the ordinance, we have not deemed it necessary to refer to that fact as strengthening the right of the plaintiffs in the premises.

Without further reference, it is sufficient to say that we think the plaintiffs have a right of property in their wharf of which they cannot be deprived except in accordance with established law, and, if it should be necessary that it should be taken or destroyed for the use of the bridge, that it cannot be done without due compensation therefor."

This case is in point not only because the principle involved is the same as that involved in the case at bar, but more especially because of the facts to which the principle is applied are of like character. In the case under discussion the right of the riparian owner within an incorporated town to build a wharf to deep water existed under an Oregon statute. In the case at bar the right to build a fish-trap exists both at common law and under the statute. Of course the origin of the right, that is to say, the

question of whether it springs from the common law or from the statute, does not affect or alter it so long as it exists.

In the case under discussion the right to build a wharf existed to facilitate the common right of navigation. In the case at bar the right to construct a fish-trap exists to facilitate the exercise of the common right of fishery. In the case under discussion the structure that formed the subject of the controversy, that is to say, the wharf, was a fixed immovable structure consisting of piles driven in the ground in such a way as to support a platform. In the case at bar the structure under consideration is a fixed and immovable structure consisting of piles driven in the ground closely together and in such a manner as to form chambers for the purpose of entrapping fish. In the case under discussion the wharf was constructed while the right to construct it existed. In the case at bar the fish-trap was constructed while the right to construct it existed. In the case under discussion the Oregon Legislature passed an act interfering with the maintenance and use of the wharf after it had been constructed. In the case at bar, the President issued a Proclamation interfering with the maintenance and use of the fish-trap after it had been constructed. In the case under discussion the Supreme Court of Oregon held that in so far as the statute interfered with the maintenance and use of the wharf it was void in that it interfered with vested rights. In the case at bar it must follow that the President's Proc-

lamation is void in so far as it interferes with the maintenance and use of the fish-trap in that it interferes with vested rights.

So also in the case of *Middleton v. Flat River Booming Company,* 27 Mich., 533. Certain mill owners had erected dams in the Flat River for the purpose of developing power to operate their mills. The Flat River Booming Company was interfering with the use of these dams in the stream and the development of power in connection with the operation of these mills by placing obstructions in the stream above the dams and impounding the water with a view of suddenly releasing it so as to assist in the floatage of logs. This conduct on the part of the Flat River Booming Company resulted in injury to the owners of the mills. The defense was that the Flat River Booming Company was incorporated under a law that gave it the right to do the things complained of, but the Court held that the right to float logs in a general sense and the right of developing power by means of dams were both public rights of such a character that one should not be exercised to the exclusion of the other, but that in the exercise of one of these rights due regard should be given to the right to exercise the other in order that both might exist together. And that the statute authorizing the Booming Company to do the acts complained of could not impair or interfere with the maintenance of the dams, since the right to maintain these had become vested and could not be devested by subsequent legislation. In passing upon this

question Judge Cooley, speaking for the Supreme Court of Michigan, says:

> "Another position of defendants is that being incorporated company and authorized by the act under which they were organized to do the act complained of, they are not liable to such suits by private parties. . . . The incorporation act can not be understood as intending to authorize the companies formed to destroy vested rights of property."

In the case of *Glover v. Powell*, 10 N. J. Eq. (2 Stockt.) 211, the principle here contended for was applied by the Supreme Court of New Jersey. An act of the New Jersey Legislature empowered the defendants to maintain a dam across the mouth of a small creek which the Court held was not navigable in fact, with a view of improving adjoining meadows. In the construction and maintenance of this dam the defendants had expended about eight thousand dollars. By a subsequent act of the Legislature enacted after the dam had been constructed, it was provided that this small creek should be considered a public highway and that the dam previously erected should be removed. The Court held that the defendants had a vested right in the dam of which they could not be deprived by a subsequent act of the Legislature. The Chancellor says:

> "The dam and water works in question are private property. They have been constructed, maintained and paid for by the owners of the meadows along the creek. They have been acquired under the express sanction of law."

It will be observed that in the Michigan case, the

dam was constructed under a right existing at common law while in the New Jersey case the dam was constructed under a statute authorizing its construction. But in either case whatever the source of the right, the parties acted within their lawful rights in constructing the dam, just as the appellant in this case acted within its lawful right in constructing the fish-trap. The dams constructed also were fixed and immovable in their character just as is the fish-trap constructed by the appellants. The property rights acquired in the cases under discussion were identical in character with the property rights acquired by the appellant. If the property rights acquired by the parties in the cases under discussion were vested rights of which they could not be deprived by subsequent legislation, the property right acquired by the appellant must for the same reason be regarded as a vested right that can not be impaired or destroyed by executive proclamation.

This legal proposition, in connection with those previously discussed, presents a public question of the highest importance. The Alaska fisheries are among the largest in the world. Many millions have been invested in them. They have given employment to thousands of fishermen, including both Indians and white men, to say nothing about the large number of Orientals employed about the canneries, and they have filled the markets of trade with a food product that is at the same time cheap, palatable and nutritious. That this industry should be pre-

served and protected is not only a matter of great concern to the people of Alaska who look to it for employment and participate in the profits resulting from it, but also to the many thousands residing elsewhere in the United States who because of the high price of meat look to it for a cheap and wholesome food supply. However important therefore the decision in this case may be to the appellant because of its direct effect upon its property rights, the decision is of far greater importance to the public at large.

Seventy-five per cent. of the fish caught in Southeastern Alaska are caught by means of fish traps. (See evidence, Burckhardt, Rec., p. 100). These traps consist of piles driven in the ground as closely together as possible and in such a manner as to form chambers into which the fish are led by means of a single row of piles extending out from the trap and called the "lead." Web is hung over the piles so driven in order to prevent the fish from escaping through the spaces that necessarily exist between the piles however close they may be driven. This appliance can of course not be constructed except in comparatively shoal water, so shallow that piles can be found long enough to reach from the surface to the bed into which they must be driven. The trap therefore can only be employed in intercepting and entrapping such fish as happen to pass within a short distance of shore. This has led the owners of the various Alaska fisheries to construct traps here and there at advantageous points along the

shores of the many islands, as well as the mainland of Southeastern Alaska.

The Alaskan Indians live in villages which dot the shores of all the larger islands as well as those of the mainland. Many of these villages are very much larger than the village of Metlakahtla where the Metlakahtlans reside. While these Indians belong to different tribes the individuals of one tribe do not differ materially from the individuals belonging to any of the other tribes. All the coast Indians, including the Metlakahtlans, have the same characteristics. If, therefore, the waters surrounding Annette Island should be set aside for the exclusive use of the Indians residing in the village of Metlakahtla, there is no reason in law or in morals why the waters surrounding the various islands situate in Southeastern Alaska should not be set aside for the exclusive use of the several tribes inhabiting those islands. In fact, our government owes a far greater duty to the Indian tribes that inhabited Alaska at the time of its purchase from Russia than it does to the Metlakahtlans who were at that time inhabitants of British Columbia. Yet it is plain to see that if the same action were taken for the benefit of the other Indian tribes that has been taken for the benefit of the Metlakahtlans the white fishermen would lose their employment and means of making a livelihood and the fisheries would be forced to retire from business with the consequent loss of the capital invested. Nor is this the expression of a groundless fear.

Not only is there every reason why these additional reservations should be created, if the one now under consideration is a valid and proper one, but since the commencement of this suit what are referred to in the newspaper reports from Washington as the "ancient fishing grounds of the Chilcats" were by executive Proclamation reserved for the exclusive use of the Chilcat tribe. This reservation is situate on the Chilcat River, a stream that flows into salt water a short distance from appellant's Chilkoot cannery. No one knows to what extent the public fisheries in Alaskan waters will in the future be affected by these executive proclamations, but everything points to the entire destruction of the public right for the benefit of the various Indian tribes.

And even though no new reservations should be created the effect of the existence of the right to create them, if that right should be established, would be almost as disastrous to the fisheries as the actual creation of the additional reservations. For no one would know when the waters surrounding his fishery would be placed in a reservation. Cannery supplies must be bought in advance and traps must be driven in advance of the fishing season. If, then, any cannery man can be prevented by executive proclamation from fishing in the waters in the vicinity of his plant, he cannot, with any assurance, invest his money in supplies, in the driving of traps, or in the making of other preparations in advance, for this done, he may find as did the appel-

lant in this case that the waters from which he must secure his supply of fish are closed to him before he can use his supplies or employ his traps for the purpose designed.

As late as the month of March, 1916, the representatives of the appellant were advised by the officials at Washington that the waters surrounding Annette Island would be open to every one and that no special fishing privileges would be given therein (see evidence Burckhardt, Rec. pp. 118-119). Upon these assurances appellant's trap was driven, and the trap had only been completed ten days when the executive proclamation was issued forbidding its operation, so that if the proclamation is a valid one the appellant is deprived not only of the money expended in connection with the construction of the trap itself, but is also obliged to bear the loss occasioned by the purchasing of its supplies in advance and the employment of the necessary Oriental labor in advance. Surely no one is warranted in carrying on business on so unstable a basis. If the public can thus by executive proclamation be excluded from portions of the navigable waters, the public right of fishery ceases to be of value. No one can make preparations to enjoy this right for he has no assurance that the right will still exist when his preparations have been made. Every reason that demanded the opening of the navigable waters to the public so that they might exercise therein their common right of fishery that existed at the time of Magna Charta exists with equal force at the present time and the

affirmative sanction given by Congress itself to the exercise of the right by passing numerous statutes in connection with its regulation furnishes an additional reason why the right so sanctioned should not be subject to invasion by executive proclamation.

It must, of course, be conceded that the President in making the proclamation under discussion was actuated by the highest motives and not by any desire to violate or impair private rights. His sole motive was undoubtedly that of assisting an inferior race, and no motive could be more lofty. But the effect of the proclamation on the business and property of the appellant is none the less disastrous. That the President did not intend the proclamation to have this effect and that the money lost was lost in helping along a good cause does not compensate the appellant for the loss sustained.

That in the past the Indian has not been getting much the better of it can not be denied, but this has been due more to the injudicious manner in which Indian affairs have been handled than to a lack of good intentions. In the States the Indians have been herded on reservations with the natural result that they have almost become extinct. It has long been a known fact that herds of wild animals soon become extinct when confined. The Indian is not a wild animal, but his roving nature and outdoor life have made him such that he thrives under the same conditions that permit wild animals to thrive. And being confined in the reservations the Indians have

become extinct for the same reasons that wild animals would become extinct under like circumstances.

In Alaska, the Government has at least until very recently never done anything for the Indian, except in the single case of the Metlakahtlans, who, as has already been said, were not Alaska Indians. The Indian has been compelled to rely upon his own resources and instead of being confined to a reservation has been permitted to live in and about the white settlements. The effect upon the Indian has not only been salutary but marvelous. His simple mind is most receptive and he responds to even the slightest change in his environment with surprising alacrity. He, like the white man, is the product of his environment, but due to the fact that he has not yet formed the habit of the white man of meeting everything new with an interrogation point, the effect of a change in his environment upon him is more marked and immediate. This is best illustrated by the cases of those Indians who have been sent to Eastern universities. They return home entirely transformed. The change in environment so affects them that they no longer resemble the Indian in appearance, even their skin seems to have whitened because of their new surroundings. Some will tell us that this is because of the fact that they have been educated and taught new things. Not so. For, place these same Indians back in an Indian camp, and in six months they do not differ from other Indians. They have not lost their education, but they have responded to the change of environ-

ment. Education may enlarge and add to the environment. It may select from any environment those things which form the most wholesome subjects for mental activity. To this extent it affects the individual, white or Indian, and no further.

When the white man came to Alaska he changed the environment of the Indian and the Indian has responded to the change so effected with the result that the Indian of today is in no sense the Indian of thirty years ago. Then he was a roaming, roving savage. Today, he is in many respects a useful member of society. Unlike the Indians of the States, the Alaska Indians are neither wards nor mendicants, but independent, self-reliant human beings. They are good miners, good fishermen, good carpenters, and among them may be found many highly skilled mechanics. That this is the result of the change in environment, brought about by the advent of the white man, is illustrated by the case of the Metlakahtlans. These Indians received a much earlier start on the road toward civilization than did those further north. When Father Duncan was added to their environment he brought with him all the changes that a single, able, courageous and benevolent man can bring, and the Indians in that case, as in other cases, responded quickly to this change in their environment. They made remarkable progress, but unfortunately our benevolent Congress reserved for their exclusive use Annette Island. Father Duncan was there, but no other white man could come. Their environment had been

changed and they had responded to the change, but further changes were prevented and thereby further progress was blocked. If they have made any progress at all in late years it is because they have not been closely confined to Annette Island so that they have been to some extent brought in contact with the conditions that exist in the neighboring white settlements. The net result has been that although the Metlakahtlans received a much earlier start, the Indians residing about Juneau, Douglas, Sitka and other white settlements have surpassed the Metlakahtlans in the race for civilization.

The development of the fisheries and mines of Alaska has been responsible for the changed environment to which the Indian has adapted himself, and which has resulted in the amazing progress he has made. But let the public waters be reserved for the use of the Indian so that the fisheries and the white fishermen are compelled to withdraw, and the Indian will sink back to savagery to the exact extent that the changes in his environment wrought by the introduction of the fisheries and the white fishermen have been withdrawn, just as surely as the Indian college graduate loses newly acquired characteristics upon returning to his native tribe.

However lofty our motives may therefore be, and however pure our intentions in creating private fisheries for the use of the Indians, the ultimate effect of our action upon the Indians themselves is bound to be quite the reverse from what we had intended it to be.

## Rivers and Harbors Act

It was contended on the part of the Government that the construction of appellant's fish trap was illegal because it had not been authorized by the Secretary of War under the provisions of the Rivers and Harbors Act.

The trial court held against this contention, and, while the Circuit Court of Appeals did not expressly so hold, there seems to be an intimation in the opinion that the contention of the Government in this regard was well founded. The portion of the Rivers and Harbors Act covering this matter, reads as follows:

> "The creation of an obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structure in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War."

Appellant's trap is situate in an arm of the North Pacific ocean many miles in width; is built on a rocky reef extending out from the westerly shore of Annette Island; is equipped with lights and with a bell, and the locality in which the trap is situated is not used by ships for the purpose of navigation, the place being out of the line of travel. The trap

being situate, however, on a reef and being equipped with lights and a bell would, if the waters were used by ships, serve as an aid to navigation in that it would warn ships off from the rocky cliff on which the trap is built. (See evidence Burckhardt, Rec. p. 97 et seq.; also see map, Rec. p. 179, and Second Finding, Rec. p. 188.)

The Court's finding upon this subject is as follows:

> "that the said fish-trap so constructed or about to be constructed is a usual and ordinary fishing appliance and as is ordinarily used by those engaged in catching salmon in the waters of Southeastern Alaska; that the portion of said trap nearest to the shore of Annette Island is situate two hundred feet to the seaward from the line of extreme low tide, and that although the said trap is in navigable water of the United States, technically speaking, it is not within any portion of the waters of the United States, which are, or ever have been, used for the purpose of navigation, and is not in, and is not an obstruction to the navigable capacity of, any of the waters of the United States in the sense used in the Rivers and Harbors Act, approved March 30, 1899."

It can not, of course, be contended that appellant's trap standing as it does on a rocky reef on the shore of the open sea is an obstruction to the navigable capacity of any of the waters of the United States. But it was contended at the trial, on the part of the Government, that since the trap was situated in the waters of the United States at a point where no harbor lines had been established, it could

only be constructed upon plans recommended by the Chief of Engineers and authorized by the Secretary of War. This brings up for discussion the question of what is meant in the Rivers and Harbors Act by the phrase, "or other water of the United States" following the words "in any port, roadstead, haven, harbor, canal, navigable river."

It is a rule of construction that where a statute enumerates specific things and follows such enumeration with a general term, the general term will be held to include only such things as are of like character to those previously enumerated. This rule is, of course, based upon the principle that courts in construing acts of the Legislature should give each word employed effect if possible. For it is not to be presumed that the Legislature made an idle use of words. So in this case, there must be some reason why Congress used the language, "in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States." If it had been the intention of Congress that the establishment of a breakwater, bulkhead or like structure should be prohibited in any water of the United States except upon plans recommended by the Chief of Engineers and authorized by the Secretary of War, there would have been no occasion for the employment of the words, "port, roadstead, haven," etc. Congress would simply have said, "in any water of the United States," and would have omitted the enumeration of specific places by which this general term is preceded. All the specific places enum-

erated are those in which traffic is apt to become congested. It is so with a port, with a roadstead, with a haven, with a harbor, with a canal and with a navigable river. And it is clear when Congress follows these specific terms with the general term, "or other water of the United States," it had in mind other waters of the United States only in which traffic might become congested. There is a reason why harbor lines should be established in places of this character or why structures should in the absence of established harbor lines be in these places constructed in an orderly and systematic manner. Piers, wharves and other structures which would if systematically constructed not interfere with navigation or be aids to navigation, would become nuisances if allowed to project one in front of the other or to be placed haphazard here and there without system or order. But this does not apply to structures built out on the shore of the open sea, and it would lead to ridiculous conclusions to assume that it was the intention of Congress that every one building a wharf, fish trap or other structure whatsoever anywhere along the thousands of miles of coast line of Alaska was to do so only upon plans approved by the Chief of Engineers and authorized by the Secretary of War.

Owing to the precipitous character of the mountains and their abrupt rise from the water's edge, white settlers and Indians alike have at innumerable points along the Alaska coast driven piles and erected thereon structures of every kind and char-

acter. The necessities of the situation have compelled the construction and erection of these structures; and while they serve many useful purposes they do not affect navigation one way or the other. Most of them are small; many temporary. In most cases they are erected in out of the way places where surveyors can not be had, and in other cases they are such as not to warrant the expense of employing a surveyor to make a survey and prepare plans, even though a surveyor might be in reach. Clearly it was not the intention of Congress to place upon those erecting these structures the useless expense of preparing plans and submitting these to the Chief of Engineers, nor was it the intention of Congress to place upon the Chief of Engineers or the Secretary of War the burden of going over and approving plans for all these innumerable projects.

The rule of statutory construction above referred to is so generally understood that it needs no citation or authorities to support it, but reference will be made to the single case of the *United States v. Bevans*, 3 Wheaton, 336. In that case the defendant was indicted for murder committed on the United States battleship Independence, and was tried and convicted in the Federal Courts under an act of Congress which provided:

> "That if any person or persons shall within any port, arsenal, dockyard, magazine, or any other place, or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or perons," etc.

It was contended that the deck of the United States battleship was a place within the exclusive jurisdiction of the United States and that because of this the Federal Courts had jurisdiction under the act quoted. But Chief Justice Marshall held otherwise, and in passing upon the matter, said:

> "The objects with which the word 'place' is associated are all in their nature fixed and territorial. A fort, an arsenal, a dockyard, a magazine are all of this character. When the sentence proceeds with the words 'or any place or district of country, under the sole and exclusive jurisdiction of the United States,' the constructions seems irresistible that by the words 'other place' was intended another place of a similar character with those previously enumerated and with that which follows. Congress might have omitted in its enumeration some similar place within its exclusive jurisdiction which was not comprehended by any of the terms employed, to which some other name might be given; and therefore the words 'other place,' or 'district of country,' were added, but the context shows the mind of the Legislature to have been fixed on territorial objects of a similar character."

The intention of the Legislature in this connection is evident not only from the fact that the general term "waters of the United States" is preceded by an enumeration of specific places such as ports and harbors, where traffic is often congested and where order and system is required in the construction of wharves and other structures, but also from a consideration of the other provisions of the act. It is first made unlawful to create any obstruction to the navigable capacity of any of the waters of the

United States. This provision is broad and refers to all structures whatsoever in whatsoever place so long as the place is in the navigable waters of the United States. There are, however, structures such as those afterwards enumerated in the act that might be lawfully erected notwithstanding the first provision, including structures that either do not impair the navigable capacity of the waters within which they are erected and such as wharves and piers that serve as aids to navigation. Yet these structures while they might not obstruct the navigable capacity of the waters in which they are situate, they might when placed in ports, harbors, havens, rivers or other places become a nuisance, unless constructed along orderly and systematic lines, and accordingly provision is made with a view of providing for their construction along such lines. Where harbor lines are established it is provided they shall not extend out beyond such harbor lines, and if harbor lines have not been established, the structure shall be built upon plans approved by the Chief of Engineers and authoriezd by the Secretary of War.

That the fish trap of appellant is not within a harbor, port, roadstead, haven, navigable river or other like place is evident from a glance at the map and is testified to by Mr. Burckhardt. And the Court also found as an affirmative fact that

> "although the said trap is in navigable waters of the United States technically speaking, it is not within any portion of the waters of the

United States which are, or ever have been, used for the purpose of navigation and is not in, and is not an obstruction to the navigable capacity of, any of the waters of the United States in the sense used in the Rivers and Harbors Act approved March 31, 1899."

This proposition also presents a public question of much importance. A very large per cent. of the people residing on the Alaskan coast are living in houses placed upon piles driven in the tide flats. This is true even in the case of the larger cities, such as Ketchikan, Fort Wrangell, Juneau and other towns. In addition to this small wharves and landing places have been built here and there along the Alaska coast for a variety of purposes and uses. And except in the case of a very few of the larger wharves no one has ever deemed it necessary to consult the Chief of Engineers or the Secretary of War with reference to these structures. If, however, these structures should be held to come within the meaning of the Rivers and Harbors Act, all these settlers would be guilty of a crime and subject to punishment. Not only is the matter of the construction of this act of importance as far as the persons who have already erected such structures are concerned, but it is also highly important in that it materially affects the future development of the territory. If every man operating in an out of the way place is compelled to prepare plans and submit them to the Chief of Engineers and obtain the consent of the Secretary of War before he can construct a landing place or build a platform with a

view of erecting thereon a house or other structure, it will put a stop at least to the work of those who in connection with small operations require the use of such structures, especially where such operations are carried on at remote points. The reasons why this would result are obvious. Clearly this was not the intention of Congress.

A reasonable construction of the act, however, in accordance with the well established rules of statutory construction will not require a submitting of plans to the Chief of Engineers or the Secretary of War for the erection of structures that do not obstruct the navigable capacity of the waters within which they are placed unless these structures are built in harbors, ports, navigable rivers or other like places where they might prove a nuisance, unless erected in an orderly and systematic manner, and this is as it should be.

Respectfully submitted,

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Attorneys for Appellant.

## ARGUMENT

By C. H. Hanford

Having in mind the importance of this case as one of public concern, as well as a sense of duty to my client I crave indulgence to submit a further and separate argument.

Until the people of this country began to feel the weight of the big stick, it was never supposed that an unoffending citizen could be divested of property by force of a presidential proclamation, not called forth by any extraordinary exigiency in national affairs. Now patriotism cheerfully accords to the President the right to exercise extraordinary power in order to win the war and make the world safe for democracy. This appeal contests no such exercise of power, although it defends against a proclamation on which the suit is based. When that edict was issued it was not admitted that our country was involved in war, and the Government was honestly endeavoring to keep out of war. Therefore, with due respect to the President, and with reverence for the Constitution, and in the sincere belief that its controversy is for right and justice affecting all people, as well as for its own material benefit, the appellant submits for determination by this tribunal the question: Whether, or not, the proclamation which it opposes can be enforced, without disregarding the guarantees of the Constitution?

Proposition One.

**There Is No Equity in the Bill**

It will be convenient and permissible to group for discussion under this topic, assignments of error numbered: First, Second, Sixth, Eleventh, Thirteenth, Fourteenth, Fifteenth and Sixteenth, all of which bear upon the main issue.

The sole object of the suit is to oust the appellant of possession of a fish-trap site. Waiving the right to question its sufficiency, on the ground that a possessory action is not cognizable in equity, we shall endeavor to show that the bill of complaint is, otherwise, destitute of equity.

The injunction granted by the decree appealed from strikes a legitimate business, beneficial to nation and to the world, carried on with due observance of law, by a corporation legally authorized to engage in that business in the Territory of Alaska. The proclamation which the decree sanctions is not a war measure, nor an exertion of governmental power to meet any exigiency in national affairs, its purpose is not to promote the general welfare, but is contrary to public policy, because it is merely an adjunct to a scheme to confer monopolistic rights upon a single individual, viz: Mr. P. E. Harris, to whom a lease was given by the Secretary of the Interior. This is a fact not disclosed by the bill of complaint, nor by evidence introduced by the plaintiff. The lease is mentioned in the testimony of C. A. Burckhardt (Record p. 118), and the scheme is fully exposed in the Congressional Record

of June 27, 1916. (See appendix to this brief.) The Metlakahtlans are mere camouflage. It is a fair inference that the President acted without better information than was offered to the trial court; and that he did not call for the Attorney General's opinion, as President Cleveland did when the first attempt was made to create a reservation for the Metlakahtlans. (See 18 Opinions of the Attorney Generals, 557.) The information given to the Senate and contained in the appendix, only became public while this case was on trial at Juneau.

The Sixth Specification of Error is based upon a statement in the opinion of the Circuit Court of Appeals, the meaning of which is that monopolistic rights conferred gratuitously are for the benefit of the whole people. Such doctrine is unique in American jurisprudence. If it were true, then by the same process of reasoning paternalism to the extent of partitioning, among the needy, other common rights, as for instance the right of navigation, would be a praiseworthy exercise of governmental power. But as a theory as well as a fact it is untrue. It would shock the country, were the Government to arbitrarily restrict the right to operate vessels as carriers via the Panama Canal for the advantage and benefit of a few, in order that the privileged ones might not become paupers; and it would be more shocking if such favoritism were made applicable to commerce between two ports on the Atlantic coast, say Boston and Charleston. It would be in vain to say this is for the benefit of the whole people

because the monopolists may thereby provide for their necessities and avoid becoming a public charge. True, the case in hand and the imaginary case are different; Alaska is far away, instead of restricting the right to navigate public water only fishing rights have been reserved, but the decision appealed from is new and strange, not comparable with any actual case previously litigated; therefore only imagination can furnish a parallel to illustrate the principle. The principle involved is that the sea is nature's bounty, as a free highway and as a conservatory of fish; and the right to navigate and to catch fish are the common heritage of all the people.

The statement referred to is untrue for another and a double reason, for that, the Metlakahtlans are not wards of the nation entitled to bounty from the Government, like the aboriginal occupiers of the country who surrendered their sources of supply to the dominant race; and they do not need and are not likely to need benevolence. They long ago reached that stage of independence contemplated by Mr. Justice Bradley when he wrote into an opinion of this Court:

> "When a man has emerged from slavery, and by the aid of beneficent legislation shaken off the inseparable concomitants of that state, there must come a stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."
>
> *The Civil Rights Cases*, 109 U. S. 3, 25—27 L. Ed. 835, 3 Sup. Ct. 18.

It is to be kept in mind that the suit is not defensive of any policy of conservation having regard to the greatest good to the largest number; an injunction is prayed for not to protect salmon from the rapacity of destroyers; viewed either as being a measure of benevolence designed by the Government for the special and exclusive advantage of the small number of people inhabiting Annette Island, which it is not; or as a scheme to suppress competition in fishing for the exclusive advantage of one individual, which it is. The suit, if successful, can only promote monopoly detrimental to the public welfare.

The appellant controverts the claim asserted in behalf of the Government that the location of appellant's fish trap is within the boundaries of the reservation established by an Act of Congress.

That location is entirely within space covered by water; the end of the trap nearest to the shore at the line of extreme low tide being distant from said line at least 200 feet.

The Act of Congress is a grant; not a conveyance of title; but grants a license to occupy *land*. The license is temporary, that is to say, revocable at the will of the grantor, and the licensees are free to occupy or not, according to their own free will.

The Act is not a contract, the license being a mere gratuity without any consideration therefor exacted, received or promised.

The licensees are aliens to whom the United States was not and is not obligated in any way,

except to afford them governmental protection in the enjoyment of such rights as pertain to alien sojourners or denizens.

The Metlakahtlans are not by reason of distitution or condition of helplessness objects of charity; they are a thrifty people and as well able to provide for their own support as the majority of citizens are. The policy of our Government is to prohibit immigration of alien paupers and those likely to become a public charge and to deport that class of aliens found in this country. The gate was left open for these people to enter and land was reserved for them to occupy and they are by a special Act of Congress permitted to engage in commerce as masters, pilots and engineers of steam vessels (Act of March 4, 1907, 34 U. S. Stat. 1411; Compiled Laws of Alaska 1913, Sec. 24), as a matter of grace, by reason of sentiment favoring them above all other aliens, because they had before emigrating from their native home advanced from a state of savagery and become educated, thrifty, capable and self reliant. Their status in this country is not the same as that of the original occupiers of the soil, who upon being dispossessed were entitled to have reserved for their use some of the lands and permanent rights of fishery and in the natural resources supplying their necessities.

The circumstances and conditions above outlined afford no justification for any strained or latitu-

dinarian construction of the Act of Congress making a reservation of the Annette Islands. The Act is not ambiguous and it is not permissible to construe it in a way to expand the boundaries prescribed. The descriptive words of the Act indicative of the extent and limitations of the reservation are "body of lands," and "Annette Islands.". An island is a tract of land completely surrounded by water, therefore the boundary of an island must be the line of separation between the mass of matter such as earth and rock constituting land and the liquid element surrounding it, called water. The Government surveys of land terminate at the water's edge.

*Barney v. Keokuk*, 94 U. S. 324-328, 24 L. Ed. 224;
*Mann v. Tacoma Land Co.*, 153 U. S. 273-286.

Hence, a grant or reservation of a body of land described as an island is a tract having a water boundary; all within the line of separation between the solid and liquid elements constitutes the granted or reserved tract.

The only absolute right appurtenant to land bounded by navigable water is the right of access; the water being a public highway the proprietor of an island or anyone having a license from the proprietor to occupy the same has a special right to use it as a highway the same as any land owner has to insist that a road which affords means of access to his property shall be unobstructed.

The argument which has been made in behalf of

the Government upon an assumption that, because the Metlakahtlans are to a large extent fishermen and dependent upon industry in that occupation for means of support, Congress must have intended to bestow a bounty in making a reservation for them, therefore, the exclusive right of fishery in all the water surrounding the Annette Islands was granted to them by necessary implication is obviously fallacious, because, such exclusive right is not necessary to the pursuit with beneficial results of their calling as fishermen. They are not restricted to any particular locality or district in which to take fish unless by reason of being aliens they are by law prohibited from taking fish in any waters of Alaska.

The legislators who framed the Act were capable of selecting words and terms sufficient to express clearly the full intention of the enactment and if Congress had intended to grant extraordinary rights in addition to setting apart an island for them to occupy the Act would have been so phrased that the President would not have deemed it necessary or proper to amplify its provisions in a proclamation.

It is not permissible to interpolate words into a statute in order to change its meaning or broaden its scope.

> *Newhall v. Sanger,* 92 U. S. 765, 23 L. Ed. 769.

The Government wanders far afield to find arguments when the descriptive words of the Act are given a free translation synonymous with the word

"region" and comparable in vastness with the whole of Alaska, or the Philippine Islands or Porto Rico.

If the judicial sanction which has been given to this preposterous proposition shall be confirmed in the final determination of this cause bureaucratic ambition to confiscate all that has been invested by citizens in the fishing industry in Alaska will be highly elated; it will not be long until all fishing rights will be dominated by the leasing system, ostensibly, for the benefit of Indians, but really for the advantage of a monopolistic trust; and graft and scandal will be the final outcome.

If in framing the Act Congress could have anticipated such extraordinary presumption, it is not probable that words to describe and limit the reservation with accuracy and precision, better or more apt than the words of the Act would have been selected. With the object in view of granting a mere privilege to occupy temporarily a location adequate for a comparatively small community, instead of making a reservation comprising a vast region or grand geographical division of country, Congress prescribed the boundaries in the words of the Act, viz.:

> "the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's Entrance."

So much, and only so much, was segregated from the Territory of Alaska for the particular use specified.

## Precedents

It is contrary to the policy, and a variance from the practice of the Government to grant monopolistic privileges or exclusive rights in public waters; and in construing Congressional grants of *land*, the courts have consistently held that the proprietary rights of grantees of land abutting upon shores of navigable water, terminate at the line of ordinary high water. A striking instance is in the decision of the Supreme Court construing the Oregon Donation Law in the case of *Shively v. Bowlby*, 152 U. S. 1-58, 14 Sup. Ct. Rep. 548, 38 L. Ed 331.

The exhaustive opinion in that case furnishes the best guide for the interpretation of the Annette Island reservation act. There is no history connected with legislation that is more interesting and instructive than the history of the old Oregon country. "Old Oregon country" is a phrase descriptive of the whole region comprising approximately 300,000 square miles of territory embracing the present States of Oregon, Washington, Idaho, and all of Wyoming and Montana west of the Rocky Mountains, and was a subject of contention between our government and Great Britain. The country was in the grasp of the Hudson's Bay Company whose policy was to hold it as long as possible as a game preserve. It was wrested from the domination of that corporation by emigrants from Eastern States, who thereby rendered a service of incalculable value to our nation and to humanity.

After the international question had been settled by treaty in the year 1846 Congress to reward the pioneers and encourage them in their undertakings as founders of commonwealths, enacted the Donation Law, conferring rights to the designated beneficiaries to acquire titles to specified quantities of land. The objects of the law were beneficent, its provisions were contractual and for adequate considerations in national benefits received and to be rendered, by developing the wealth of the country. The pioneers were empire builders, and the use of the shores and waters contiguous to the lands selected by them was essential to the accomplishment of their purposes, especially for the erection of wharves and buildings as aids to commerce. These conditions afforded cogent reasons for application of the rule of liberal construction of the law with respect to shore rights of the donees made especially valuable by their improvements for public convenience. The decision in the case cited, however, adhered rigidly to the prevailing rule for construing Congressional grants of land which limits the definition of the word "land" within its common and ordinary meaning, so that in the application of the law to a tract bounded by the shore of navigable water, the proprietary rights of the grantee terminate at the line of ordinary high water, and does not include exclusive rights in the shore or contiguous waters.

No claim to shore rights, nor to space between the lines of high water and low water is contested by

the appellant; the issue is clean cut and involves only a claimed *exclusive* right of fishery offshore. The rule for construing Congressional grants of land, which limits such grants to upland, is applicable to this case, because it precludes all claims to granted rights, by implication, to territory exterior to a water boundary, which, in cases of grants reaching to navigable water, is the line of ordinary high water. That rule, though broader than our contention, supports it. If it shall be deemed proper to assume that the reserve includes the whole of Annette Island including its shore, and by reason of the plural word "Islands" to include also the small adjacent islets and the shores thereof, the case may rest on that assumption, and still the trap will not be an encroachment upon the reserve. An exclusive right of fishery offshore is different from a right appertaining to land, so different in essence, so extraordinary, and so unnecessary to the beneficial use of land, that it does not come within the category of rights appurtenant to the title to real estate.

*Baron v. Alexander*, 206 Fed. Rep. 272.

> "From the wild and wandering nature of fish they are not, nor can they be, the subject of ownership in running streams, * * * in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein."
>
> *Parker v. People*, 111 Illinois 588.

A body of land is not an area of water, and an island is distinct from the water surrounding it.

The act is specific, making a reserve of the "body of lands known as Annette Islands." There can be no addition of space exterior to the reserve, nor of rights in such exterior space by mere implication, without disregarding the plain significance of the words "lands" and "Islands" and interpolating, by supposed intendment, other words to express the legislative will to include exterior space of unlimited extent.

What does the act reserve? Answer—A body of lands.

What particular body of lands? Answer—Annette Islands.

Sentimental construction, rather than legal interpretation of the Act, is what the Government contends for, as being requisite to fulfill an imaginary promise of the Great White Father to confiding children.

The relevant fact is that these Indians were led by a courageous white man to immigrate to, and occupy Annette Island, without any invitation, or promise; the idea of their being deceived or trapped is ridiculous. Previous to their coming the plan to set apart Annette Island as a reservation for them, by an executive order, had been disapproved, as illegal, by the Attorney General of the United States; and it was not until three years after their settlement on the island that Congress passed the Act. Tameness is not characteristic of Indians either before or after they have been educated in the ways of white people, and a religious community

having enough independence to revolt against the authority of a bishop could never be caught in a trap that had to be constructed while they were waiting to get into it.

In one of its most recent decisions the Supreme Court held that even a reservation of fishing and hunting rights contained in a conveyance of land, made by Indians, may not be so construed as to vest in the grantors exclusive rights, nor to include, by implication, rights not contemplated by the parties at the time of the transaction.

> *New York ex rel. Kennedy v. Becker*, 241 U. S. 556, 60 L. E. 1166.

In 1892 President Harrison issued a proclamation setting apart: "Afognak Island, Alaska, as a public reservation, including use for fish culture station, and its adjacent bays and rocks and territorial waters, including among others the Sea-lion Rocks and Sea Otter Island," and warning all persons to not enter upon, occupy or fish in that reservation. (27 U. S. Stat. 1052). At that time the Russian American Company was an occupant of Afognak Island and had valuable improvements thereon, but had no title better than a squatter's right, which, in the case of *Russian American Co. v. United States*, 199 U. S. 579, was held to have been terminated by the proclamation. The memorandum opinion of the District Court cites that proclamation and decision (Record, pp. 46-7) as a precedent for a reservation of public water, not

authorized or confirmed by an Act of Congress. That citation is a misfit. The decision referred to does not touch any question involved in the present case; it only affirmed a decision of the Court of Claims, denying any right of the plaintiff to compensation for its improvements and losses consequential to eviction from *land* reserved for public use.

Sections 12 and 13 of the Act of Congress repealing the timber-culture laws contain provisions for the sale of lands in Alaska, and for surveys; the 14th section provides that none of the provisions of the two preceding sections shall warrant the sale of lands containing coal, or precious metals, or town sites, or which shall be occupied or reserved for public purposes, or to which the natives have prior rights, "or which shall be selected by the United States Commissioner of Fish and Fisheries on the islands of Kadiak and Afognak for the purpose of establishing fish culture stations"; the 24th section authorizes the President to reserve forest lands. The recitals in President Harrison's proclamation refer to the 24th and 14th sections of said act, and state that,

> "the United States Commissioner of Fish and Fisheries has selected Afognak Bay, River and Lake, with their tributary streams, and the sources thereof, and the lands including the same on said Afognak Island, and within one mile from the shores thereof, as a reserve for the purpose of establishing fish culture stations, and the use of the United States Commission of Fish and Fisheries."

Thus it appears that Congress contemplated a fish culture station and designated two islands as locations therefor, and conferred upon the Commissioner authority to select either or both of those islands for that particular use. Obviously water was essential for the particular use specified and that was a public use. The Commissioner selected the waters of Afognak Island and the lands including the same, and an area comprising one mile from the shores. The proclamation defining the reservation did not include that area. President Harrison was careful to not transcend executive power by attempting to create a reservation comprising public water exterior to the land which Congress designated; by his proclamation there was set apart, only, "Afognak Island, Alaska, and its adjacent bays and rocks and territorial waters, including among others the Sea-lion Rocks and Sea Otter Island." The map of that island shows that it is indented with coves; its land projections resemble the teeth of a circular saw. The bay, the river, the lake and the little coves indenting the rim of the island are not exterior to its boundary, but are strictly territorial waters; and inclusion thereof in a reservation for a public use is not a precedent for reserving a zone surrounding a large island for the exclusive benefit of a few people.

### This Case as One of First Impressions

As a reason for disregarding the adjudicated cases as precedents of controlling authority in this

case, it has been contended that the Annette Island Reservation Act is a thing of its own kind. It is true that the Act is unique and being so regarded the decision called for appeals to the conscience of a court of equity; mere sentiment should not outweigh sense and justice. The Government in this case demands a sacrifice of the appellant's property and rights acquired legitimately in the prosecution of an industry beneficial to mankind in general, and therefore, deserving of protection in a court of equity. Citizens, upon whom the Government must depend to fight and pay taxes to defend and support it, are entitled to have their rights respected. Confiscation of the property of citizens for the mere purpose of benevolence to aliens is what representatives of the Government in this case are demanding. The demand under the guise of a benevolent purpose is nothing less than rank injustice intolerable in a court of equity. In a case of first impressions, without a justifiable cause for an unusual or strained construction of a statute which is free from ambiguity and, therefore, not a subject calling for application of mere theories for its interpretation, the demand is shameful rather than meritorious.

The Act is special, for a special object, and that object was not to assume a burden to provide means of support for indigent foreigners; any difference between the reserve and other Indian reservations leaves the Act in the class of special statutes, and subject to the rules applicable for interpretation of special statutes. Every word therein must be

deemed to have been selected to express accurately the legislative will, so that what is expressed negatives all that might be implied. *Expressum facit cesare tacitum.*

Neither the Act by itself, the Proclamation by itself, nor the two coupled together transform the substance of water into land, nor warrant an assumption that the boundaries of a grant prescribed by an Act of Congress are so expansible as to include rights and benefits in the use of contiguous waters, merely because the grant would be more valuable with such rights and benefits appended.

The President is not authorized by the Constitution, or any law, to appropriate any part of the public domain, either land or water, to make a reservation for the benefit and use of Indians who are *aliens.* The whole argument attempting to maintain the validity of this Proclamation is fallacious for the reason that it leaves out of consideration the very substantial difference between the obligations of our Government towards Indians whose homes in our country are theirs by birthright and mere gratuitous benevolence towards Indian immigrants. All the authorities supporting the proposition that a reservation for Indians may be set apart by an executive order have reference to reservations for Indians who have natural rights to inhabit this country, and who are deemed to be wards of the nation, and subject to laws for their benefit to be executed by the executive branch of the Govern-

ment. The Metlakahtlans have no such natural right, nor do they have the status of natives under guardanship. The law on this subject is clearly and fully set forth in the opinion by Attorney General Garland, dated February 28, 1887, 18 Opinions of Attorney Generals, page 557.

That opinion is based on fundamental principles and it is sound, now, as it was when President Cleveland heeded the advice of the eminent attorney general who gave it. Those principles deny authority in the executive branch of the Government to grant special privileges to aliens, derogatory to rights of citizens. An executive order making an original reserve of unappropriated land for temporary use would be less harmful and, therefore, less obnoxious to the supreme law of this nation, than a proclamation extending to new territory exclusive rights, involving confiscation of property and deprivation of existing rights of citizens.

John Marshall, the great Chief Justice, made the announcement that ours is a government of laws and not a government of men. The President is not vested with dictatorial power so that he may take from all the people that which belongs to all the people, and bestow it as a mere gift to whomsoever he will. The boast of Americans that ours is the best government ever designed by man is a vain boast, unless it be true that ours is better than popular governments which preceded it, because we have a written Constitution which is the paramount law of the land, which regulates and controls the

operations of the Government as a perfect machine whose parts work in combination, but separately, in a way to check excesses in exercise of authority. The Constitution distributes the powers of the Government between the three co-ordinate branches and every attempt of the executive branch to legislate, either by proclamation as an original measure, or by adding to or taking away from the enactments of Congress, is unconstitutional and, therefore, null and void.

*Williamson v. United States*, 207 U. S. 425. 52 L. Ed. 278, 28 Sup. Ct. Rep. 163.

> "The Congress, representing the people of the United States, has under the Constitution the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

This is in terms an express grant of power *to Congress,* to be exercised only in the mode required for the enactment of laws. The President is not *Congress,* and we wish to emphasize the point that every attempt by a proclamation to exercise power vested only *in Congress,* is an unlawful usurpation.

Congress alone has power to make rules and regulations respecting Alaska, as territory of the United States, and its governmental power is to be exercised in view of the purpose for which our Government may lawfully acquire territory, that is to say, with a view to the erection of new states to enter the Union on an equal footing with the original states. Congress has declared the status of Alaska to be territory eligible to become one or more states

of the Union which will have governmental and proprietary rights with respect to its waters.

Act of May 14, 1898, 30 U. S. Stat. 409, 1 F. S. A. 45.
Comp. Laws of Alaska, 1913, Sec. 92.

There are precedents for proclamations and executive orders which have not been condemned by the judiciary. On the other hand the courts have usually been sensitive of any derangement of governmental machinery in this particular and have vindicated the Constitution by nullifying executive orders which encroach upon legislative power.

A notable instance is the decision of the Supreme Court in the case of *Nelson v. Northern Pacific Railway Company*, 188 U. S. 108; Sup. Ct. Rep. Vol. 23, p. 302, 47 L. Ed. 406. Nelson was a settler on public land of the United States, claiming part of an odd-numbered section within the limits of the land grant made to the Northern Pacific Railroad Company. His right to acquire the title was contested and had been rejected by the officers of the land department for the reason that at the time of initiating his settlement the section, though not within the limits of the grant as fixed by any previous definite location of the line of the Northern Pacific Railroad, was within limits having reference to preliminary designations of contemplated locations of the railroad. Before the actual final survey and definite location of the railroad, it had been the practice to file in the General Land Office maps of the general route made from surveys indicating lines

which might be ultimately selected, and it was deemed necessary to prohibit settlements and filings on odd-numbered sections which might ultimately be found to be within the limits of the grant, in order to prevent diminution of the grant by the vesting of rights prior to the definite location of the railroad, and for that reason executive orders were issued from time to time withholding from settlement thereon odd-numbered sections. Then it was not Metlakahtlans but a railroad corporation that was the beneficiary, and then, as now, the executive was moved to make the grant better than the wisdom of Congress had prescribed, and in utter disregard of the rights of citizens the odd-numbered sections within the public domain extending from Lake Superior to Puget Sound and Portland, Oregon, were reserved until such time as the railroad officials might find it convenient to make their definite selections of a route. Nelson was obstinate in holding on to his claim and improved it as a farm, and the Land Office afterwards issued a patent to the Railroad Company conveying a title including Nelson's improvements. The Supreme Court, however, awarded the land to him for the reason that his right was initiated anterior to the time when the railroad grant attached to the section in which his claim was located, and held the preliminary withdrawals of public land for the benefit of the railroad, by executive orders, to be unauthorized and, therefore, null and void.

**Rules, Regulations and Restrictions to Be Prescribed**

The Act provides that the reservation shall be held and used by the licensees in common,

> "under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

Manifestly this last clause of the Act does not confer legislative power upon the executive branch of the Government to amend the Act by any enlargement, extension, or curtailment of the area reserved; or by adding thereto a grant of an extraordinary exclusive right of fishery in water not within that area. What does the Act say shall be—under rules and regulations and subject to restrictions to be prescribed?

The answer to that question is obvious; the authority to prescribe rules, regulations and *restrictions* is governed by the preceding words—"to be held and used by them in common": and by the Constitution of the United States, which distributes the powers of the Government between its three branches, so that Congress may not in any instance delegate power to the executive branch to prescribe rules or regulations effective to amend, alter, or change the meaning of statutes.

> *Williamson v. United States*, 207 U. S. 425; 28 Sup. Ct. Rep. 163; 52 L. Ed. 278.

The Proclamation contains in its preamble the following recitals:

> "Whereas, the Secretary of the Interior, with

a view to assisting the Metlakahtlans to self support, has decided to place in operation a cannery on Annette Island; and whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery."

Here we have a declaration of intention on the part of the Secretary of the Interior to undertake an industrial enterprise to aid the Metlakahtlans to self support, coupled with the further declaration that for the success of the proposed enterprise a reservation of the fishery in question is necessary. If our Government is to engage in such an enterprise to assist the needy there are plenty of American citizens whose needs are more urgent than the Metlakahtlans. The Government was ordained and established and is being supported by its citizens for their own welfare and benefit, and its duty is to them, insofar as it may be deemed to have a duty to assist the needy. It has no more right to employ its energies and resources for the benefit of Metlakahtlans than it would have to do as much for a colony of Belgians, or afflicted people in any foreign country who may seek betterment of conditions by voluntarily immigrating to and occupying a vacant island in Alaska. There are plenty of such communities in districts where war, famine and floods have inflicted desolation and heart-rending misery. The Metlakahtlans, however, are not in a situation of distress entitling them to appeal for

charity; they are as well able to support themselves in comfort as the majority of American citizens are. Our Government if wisely administered should be just before being generous, or, if generous, should look for objects among its own citizens more in need of its benefactions.

The assigned reason for the Proclamation is untrue because a reservation of a large area is not essential to the operation of a cannery. There are many canneries in Alaska which have been operated successfully for many years without having as yet broken down the principle that fish in the sea are nature' bounty to which all the people have equal rights.

## No Proof of the Declared Intention Contained in the President's Proclamation

If it were true that the Secretary of the Interior had actually decided to operate a cannery the fact of such decision should have been proved in support of the complaint in this case, but there is no such proof; the nearest approach to evidence of the intention is to be found in the affidavit of D. Noll (Record, p. 60), in which he says:

> "That the plaintiff has now made further arrangements for the upbuilding of said fishing industry for the benefit of said Metlakahtlans and has encouraged them to drive traps for the purpose of catching fish * * *
>
> The defendant for the purpose, among others, of thwarting the plaintiff in its said plans and arrangements and annoying, harassing and injuring the plaintiff therein and destroying said

> scheme and injuring said Metlakahtlans has driven a fish trap on the west coast of said reservation at or near Cedar Point."

In other affidavits there are similar hints of arrangements, plans and a scheme, but nothing nearer definite proof of facts indicating the real intention of the Secretary of the Interior with respect to a fish cannery.

There is a reason for this withholding of evidence disclosing the real *intention, plan, arrangement and scheme* which is almost, but not entirely hidden. The thing decided upon by the Secretary of the Interior was not the operation of a cannery but the granting of a lease to a man named P. E. Harris, who is not a Metlakahtlan, and granting to him as a monopolistic right of fishery the zone described in the Proclamation. A partial disclosure is in the affidavit of Harris on page 55 of the printed Record and in the testimony of C. A. Burckhardt, on his cross-examination. (Record, pp. 116-118.) The *scheme* is more fully revealed in a speech by Honorable James Wickersham, representing Alaska in Congress, as its delegate, printed in the Congressional Record under date of July 25, 1916. We quote from a pamphlet issued from the government printing press:

> "Quite recently Secretary Lane caused the reservation of 3000 feet in area around Annette Island, excluded all Alaskans from fishing in the area, and leased the privilege of that fishery to a non-resident fish trust employee, giving him a written contract in the name of the United States for a special fishing privilege

there for five years. If Alaskan waters are thus subject to the Secretary's contracts the fisheries of Alaska may next be leased to the Fish Trust and all Alaskans excluded."

The Proclamation is the first and only public assertion of exclusive rights of fishery in the public waters of Alaska. It was not issued until after the appellant located and constructed its fish trap, involving an investment of a large amount of money, with due observance of the fishing laws enacted by Congress.

The claim that appellant had foreknowledge of an intention to make a reserve of fishing ground including the location of its fish trap, by an executive edict, is based on nothing except the affidavit of Harris (Record, p. 55), alleging an admission made to him by Tom Heckman, at an unremembered date,

> "that he then knew about the lease, and of the Proclamation of the government about to be published in regard thereto, and that his said Company also knew thereof."

Before accepting an ex parte affidavit as proof of such an extraordinary fact the Court should have information as to how a mere intention of the President could have leaked out, or have been communicated to a man at Ketchikan, not having any confidential relationship with the President or any member of his Cabinet. The evidence in the record is too flimsy to support a finding of any material fact; and the finding which the Court below did make (Record, p. 189), that Heckman made such

statement to Harris, prior to the issuance of the Proclamation, is of no importance whatever, because it falls far short of proving that the appellant challeneged a contest with the Government by placing a trap where its right to do so was denied, or to be disputed. A finding reaching to that point was not made, and could not be made, consistently with the evidence, for the reason that uncontradicted evidence proves that immediately previous to driving the trap appellant obtained information through its representative at Washington, D. C., to the effect that no exclusive right of fishery would be granted in or by the contemplated lease to Harris, and that appellant did not have notice or any knowledge of or concerning the Proclamation prior to May 4th, 1916, on which date a telegraphic notice was received from an Assistant Secretary of the Interior. Testimony of C. A. Burckhardt, Record, pp. 87-118-119.

Since Magna Charta control and regulation of fishing rights has been, and is, by the common law of England a legislative function, Crown Grants of exclusive rights being expressly forbidden, and in the jurisprudence of this country based upon the common law the right of fishery in public waters belongs to all the people, controlled and regulated within the States of the Union by statutes enacted by their respective legislatures.

*Gould on Waters*, 3rd ed., Sections 1, 2, 30, 32, 34, 36, 39, 189.

*McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248.

*Manchester v. Massachusetts*, 139 U. S. 259-260, 35 L. E. 159, 11 Sup. Ct. Rep. 559.
*United States v. Shauver*, 214 Fed. Rep. 157.
*United States v. McCullagh*, 221 Fed. Rep. 292.

The power to govern the territories is vested in Congress.

*National Bank v. County of Yankton*, 101 U. S. 133, 25 L. Ed. 1046; 1 Kent's Comm. Star. p. 384.

This means that the power of the Government is to be exercised by Congress in like manner as governmental power is exercised by the states within their territorial boundaries, and as to matters subject to regulation by legislative enactment Congress must act. The President cannot govern the territories by proclamations.

## No Equity in the Bill

There is no equity in the bill; this is so for a reason additional to the foregoing and, especially cogent, viz.: The Government is not the real party in interest, but appears as a mere volunteer litigant for the sole benefit of others to whom it is not legally nor morally obligated. The lack of any legitimate claim which might be asserted in behalf of the Metlakahtlans is clearly pointed out in the very able opinion of Attorney General Garland (18 Opinions of Attorney Generals, p. 557), wherein he denied that the President has authority to make a reservation for the use of alien Indians.

On the subject of the right of the Government to undertake and carry on litigation in which it has no beneficial interest this Court has spoken with emphasis as follows:

> "In short, if there does not appear be any obligation on the part of the United States to the public, or any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances. Of course, the interest must be made to appear in the progress of the proceedings, either by pleading or evidence, and if there is want of it, and the fact is manifest that the suit was actually brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail."
>
> *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 286; 31 L. Ed. 747, 758; 8 Sup. Ct. 850.

That point was decided in affirming a judgment dismissing a bill in equity for cancellation of a United States patent confirming a Mexican grant of land in California. That part of the opinion, by Mr. Justice Miller, of which the above quotation is an excerpt, called forth express approval from Mr. Justice Field in his concurring opinion.

Id. 125 U. S. 308; 31 L. Ed. 759.

Any question as to status, in this country, of the Metlakahtlans is a political question, determinable by Congress, and the courts will consider their status to be what the administrative branch of the

Government holds in that regard. It is an undeniable fact that they are aliens. Congress did not adopt them as wards of the nation by merely setting apart an island for their temporary occupancy; and at a time since the commencement of this suit, it refused to make an appropriation for their especial benefit; and in conferring upon them as a particular favor the right to become licensed masters, pilots and engineers of steam vessels, Congress expressly declared their status to be that of alien immigrants. Hence, no claim can be maintained that these people have acquired, by acts of Congress, the status of dependents, like that of native Indians, in whose behalf the Government is obligated, or authorized, to litigate. The rule of deference to the administration is not so rigid as to preclude an injured party from contesting the validity of capricious exertion of Governmental power, nor limit the freedom of the judicial branch to adjudicate all questions in this particular case. On the contrary, the appellant invokes that rule, for the reason that the only occasion on which the executive officers appear to have given serious consideration to any question as to the status of the Metlakahtlans, was when a petition to the President to create a reservation for them by an executive order was denied, per advice of the Attorney General, on the ground of lack of lawful authority to make such order for the benefit of aliens. (18 Opinions of Attorney Generals 557.) That opinion is copied in the appendix to this brief. Subsequent proceedings have not overruled

that determination; the establishing of a school on Annette Island must be deemed to have been in line with the general educational policy of the Government, and not because the inhabitants are Indians: and the deposing of Duncan from control of affairs on the island, if lawful, must be deemed justifiable by virtue of authority to prescribe rules, regulations and *restrictions* respecting the mere occupancy of the island, conferred upon the Secretary of the Interior by the Act which provides:

> "That until otherwise provided by law the body of lands known as Annette Islands, * * * be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, * * * to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

To hold that exclusion of Duncan from control of property and community affairs on the island was effective to reduce the inhabitants to a condition of dependency, or to impose upon the Government a duty, or right to litigate in their behalf, is equivalent to an unwarranted extension of the power conferred to "prescribe rules and regulations," and restrictions. The government did not then or thereby take upon itself the responsibilities of a guardian; proof that it did not, is in the fact that, the sawmill and the cannery were permitted to fall into disuse and many of the people abandoned their homes on the island. And no fact or circumstance developed in this case has placed the Government in

such attitude towards the Metlakahtlans as to constrain the courts to regard them as being other than aliens, without any legitimate claim to parental solicitude on the part of the Government.

Proposition Two:

**The Act Reserving Annette Islands Is Specific—It Contains No Implied Promise of Benefits Additional to the Right to Occupy and Use as Others Occupy and Use Land**

Assignments of error numbered Third, Fourth and Fifth controvert the conclusion drawn from the following observations in the opinion of the Circuit Court of Appeals:

> "In the present case there is no question about the President's reservation of Annette Island being in conflict with the preceding Act of Congress. It is not; but on the contrary the reservation is in conformity with the purpose of the Act and was designed to carry that purpose into practical effect. * * * We can think of nothing more practical, under the circumstances, than the reservation by the President of the waters immediately surrounding Annette Island for the use and benefit of these Indians; and this was undoubtedly the practical purpose Congress had in view when it made the original reservation. (Record, p. 240.) * * * And we must hold that the reservation of Annette Island by the Act of Congress, and of its surrounding waters by the President's proclamation is fully sustained." (Record, p. 244.)

By the Court's reasoning it would appear that, twenty-five years after the enactment, a proclama-

tion was required to declare one of its purposes, and that a proclamation is means appropriate for construing a statute in a way to make it express the will of the legislative body that passed it. This is so because, in the opinion the purpose to confer special and exclusive rights in the waters surrounding the island, is treated as being additional to what was expressed by the Act itself. The concluding sentence in the above quotation certainly conveys the idea that two reservations were made; one of land by the Act of Congress and one of water by the proclamation; and to justify the additional reservation of water an intention on the part of Congress to include it, is grafted upon the Act making the reservation of land. The conclusion we are combatting is diametrically opposed to the decision in *Shively v. Bowlby*, referred to in the opinion as a controlling authority; and the Court disregarded entirely its own conflicting decision in the case of *Barron v. Alexander*, 206 Fed. Rep. 272, wherein it affirmed a decision of the same court in which this case was commenced, denying the right of an owner of land abutting upon navigable water in Alaska to restrain the construction of a fish-trap in front of his premises. The argument in the opinion, respecting the supposed purpose of Congress, is wholly conjectural and based upon nothing, except the great advantage to the Metlakahtlans of having a fishing preserve. Practicability is featured in the opinion. If "practical effect" may justify expansion of boundaries and addition

of extraordinary exclusive rights, a very practical question is: How are the Metlakahtlans benefited, or to be benefited by the scheme in aid of which the reservation of water was proclaimed? It is an incontestable fact that, although the injunction has been in force during the salmon fishing seasons of 1916, 1917 the Metlakahtlans have not been benefitted thereby. Without the injunction they were and are privileged to catch fish and set their own traps and sell their catches and to earn wages as employees in any of the canneries in Alaska. (Testimony, Record, p. 95.) No special benefit in having a cannery operated on the island has materialized; the one leased to Harris was destroyed before this suit was commenced; he has not reconstructed it and the ostensible reason for the proclamation, viz.: that the Secretary of the Interior proposed "to place in operation a cannery on Annette Island" is necessarily chimerical; he has not and never did have either lawful authority or money essential to the carrying on of such business. An attempt to obtain from Congress an appropriation for that purpose failed; the particulars of that attempt are matters of common and general knowledge, made so by publication in the Congressional Record of Senate proceedings June 27, 1916 (Bound volume p. 10046).

The Act making a reservation of Annette Island is not ambiguous, it does not require interpretation and it is not admissible to construe it so as to enlarge its scope.

Proposition Three:

**The Appellant's Fish-Trap Is a Lawful Structure; Occupying a Site Lawfully Selected and Used**

This brings for consideration the Seventh, Eighth and Tenth assignments of error. It is an undisputed fact that, for ten years prior to the commencement of this suit the appellant carried on the business of catching, canning and marketing salmon in Alaska, and by compliance with the laws of that Territory it was authorized to carry on that business there.

In the rightful exercise of its power to govern the territories Congress enacted laws regulating the fishing industry in Alaska.

The Act of June 14, 1906, 34 U. S. Stat. 263, prohibits aliens who have not declared their intention to become naturalized, and are not natives of Alaska, nor employees of citizens, and corporations not authorized by the laws of the United States or any State, Territory or District thereof from catching or killing fish in Alaska, except with rod, spear or gaff. It prescribes penalties, authorizes searches and seizures, and authorizes the Secretary of Commerce to make rules and regulations to effect the objects of the Act.

The Act for the protection and regulation of fisheries in Alaska, enacted June 26, 1906, 34 U. S. Stat. 478, imposes license taxes on the business of canning and curing fish, with exemptions in favor of owners of private salmon hatcheries; forbids any

dam, barricade, fence, trap, fishwheel, or other stationary structure, except for fish culture, in places where the distance from shore to shore is less than five hundred feet, or within five hundred yards from the mouth of any stream to which red salmon resort or within a designated distance from any other stationary appliance for catching fish; prescribes a close season; authorizes the Secretary of Commerce to make rules and regulations and to make reservations of streams and lakes for spawning grounds; forbids the canning of fish more than forty-eight hours after it has been killed and wanton waste or destruction of food fish; prohibits false labeling; requires those engaged in the fishing business to make annual reports to the Secretary of Commerce; provides for deputizing officers to enforce the Act; and designates the Courts in which violators of the Act may be prosecuted.

Manifestly, the object and purpose of these laws is to prevent the extinction of fish, protect the public against the evil of marketing unwholesome food and conservation of one of the important natural resources upon which the world depends for food. They are intended to encourage rather than prohibit enterprise in maintaining and operating salmon canneries. By regulating the location of traps they recognize and approve traps as a legitimate appliance for securing fish to be canned. They do not require action by the Chief of Engineers and Secretary of War to approve plans and authorize construction. In so far as usual and well known

methods of fishing and appliances are not restricted, they are sanctioned by Congress; and one who with due observance of these laws, selects a location and constructs a fish-trap thereon, is not a trespasser, but is a licensee of the United States and has a vested right to maintain and use it.

In support of its decision the Circuit Court of Appeals cited *Manchester v. Massachusetts*, 139 U. S. 240; *Shively v. Bowlby*, 152 U. S. 1, 47, 57; and *Weber v. Harbor Commissioners*, 18 Wall. 57.

Each of these three decisions is founded upon the doctrine of Sovereignty, and affirms the validity of laws enacted in the exercise of *legislative power*, to conserve the public interests in fisheries, or commerce. Capricious acts of administrative officers have no ground of defence in anything decided, or said in either case. In *Manchester v. Massachuetts*, this Court affirmed the constitutionality of statutes of that state, asserting dominion over its territorial waters and prescribing regulations, deemed to be reasonable, of fisheries therein. In *Shively v. Bowlby*, this Court adhered to the lines of previous decisions with respect to the power of Congress to govern the territories, and rules for construing grants of land within the public domain, and the trust subject to which the National Government holds the title to land under public navigable waters within the territories, and specifies the exceptional conditions under which *Congress may make grants of such lands.* In the precise words of the opinion:

> "Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations, and among the several States, or to carry out other public purposes appropriate to the object for which the United States holds the territory."

In *Weber v. Harbor Commissioners*, the plaintiff being owner of some lots in the harbor of San Francisco, where land had been made by filling beyond the line of the natural shore, claimed rights as owner of a wharf projecting into the harbor, which he had constructed and maintained for seventeen years, and he complained of interference destructive of its utility by harbor improvements made, or about to be made, pursuant to authorization given by statutes of the State of California. The decision denied the validity of the plaintiff's claims as to riparian rights, and as to ownership of the wharf acquired by prescription; and upheld the statutes enacted in assertion of the State's ownership of the soil beneath public waters within the State and right to make harbor improvements.

It is impossible to draw from either or all three of these decisions a conclusion sustaining the decree appealed from, except on a theory of equivalents; assuming executive will, and a proclamation, to be equivalents which may be substituted for and in place of legislative power, and a statute; but under

our constitutional government, any such theory is unsound.

Proposition Four:

**The Rivers and Harbors Act Affords No Justification for an Injunction in This Case**

The Ninth Specification of Error questions that part of the decision of the Circuit Court of Appeals, referring to the Act of Congress known as the Rivers and Harbors Act, which has no relationship whatever to the declared purpose of the proclamation. The fish-trap having no connection with Annette Island and being situated on a rocky reef near one side of a wide, deep waterway, where the Government has no lighthouse or signal station for warning navigators, does not molest the Metlakahtlans, nor is it an impediment or hindrance to commerce; on the contrary, the light and bell thereon necessary for its protection, is a valuable means of safety in the navigation of those waters (Testimony of C. A. Burckhardt, Record, p. 98); and it is not within the inhibition of said Act. The District Court disposed of the Government's contention as to this point in its memorandum decision, saying:

> "so far as this contention is concerned, I am constrained to hold with the defendants—I do not think that the structures are a hindrance to navigation." (Record, p. 49.)

The law referred to is Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 U. S. Stat. 1151, U. S. Comp. Statutes 1901, p. 3541, the text of which is as follows:

"Sec. 10. That the creation of any obstruction not affirmatively authoriezd by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

This law is in two divisions; the first is general and sweeping; admitting of no exceptions it prohibits the creation of obstructions to the *navigable capacity* of the waters of the United States, not affirmatively authorized by Congress. The second division is different. This part of the law enumerates specifically, places where harbor lines have been established, any port, roadstead, haven, harbor, canal, navigable river, lake, harbor of refuge, inclosure within the limits of any breakwater, and channel of any navigable water of the United States, and *other water of the United States.* And prohibits structures, excavations, fillings, and alterations in

those places and waters, except according to plans recommended by the Chief of Engineers and previous authorization by the Secretary of War.

Manifestly, this law was designed intelligently and phrased in carefully selected words and there is an obvious reason for the enumeration of places where structures affecting navigation and commerce should be kept subject to governmental oversight and control; habors, roadsteads, canals, navigable rivers, and all the other places enumerated where commerce may become congested, are such places. But it was and is unnecessary, and would be unstatesman like to impose upon industrial enterprise and the War Department the stupendous burden of making surveys, examinations and plans for every useful structure that may be located on any of the many thousands of available sites along the many thousands of miles of sea coast within the jurisdiction of the United States. Hence a lawful and reasonable interpretation of the Act is called for to determine what is comprehended by the phrase, "other water of the United States." Does it include all of the deep sea that washes our shores as far as national dominion extends, and all streams and ponds within the public domain, whereon boats and timber may float? Or must it be construed in a practical way, so that its applicability to places and waters shall be commensurate with the scope and purview of the Act? The answer to these questions has been given by this Court, in the case of *Leovy v. United States,* 177 U. S. 621-633; a case founded

on Rivers and Harbors Acts, amended and supplanted by this Act of 1899. In its opinion the Court said:

> "When it is remembered that the source of the power of the general government to act at all in this matter (of flowing waters in the state) arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the Acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a *practical* construction must be put on these enactments as intended for such large and important purposes."

Although the question which the Court had to decide in that case was materially different from the question in this case, and the statute has been amended, the reason for a *practical* construction which will not restrict the intended scope of the Act is applicable in this case, for the amended law was not intended to be despotic nor to subject an honest enterprise to petty tyranny and confiscation. The title, frame, and context of the present law suggest the rule indicated by the phrase *Ejusdem generis*, as the practical rule for interpreting the general words "other water of the United States" following the enumeration of places and waters, to which the Act refers. That rule is established in the jurisprudence of this country by numerous decisions of the courts, some of which are cited in the opinion of the Circuit Court of Appeals for the Eighth Circuit, in *First National Bank v. United States*, 206

Fed. Rep. 379. The citations include the case of *United States v. Chase*, 135 U. S. 255, 34 L. Ed. 117, 10 Sup. Ct. 756. The rule and the reasons and authority on which it rests are clearly set forth in *Missouri Pac. R'y Co. v. United States*, 211 Fed. Rep. 893-896, wherein the Court said:

> "Where general words follow an enumeration of particular classes of persons or things, they will be construed as appliacble only to persons or things of the same general nature or class as those enumerated. * * * The principle involved is illustrated by the case of *United States v. Bevans*, 3 Wheat. 336, 4 L. Ed. 404. In this case William Bevans was indicted for murder in the United States Circuit Court for the District of Massachusetts. The offense was alleged to have been committed on November 6, 1816, on board the United States ship of war Independence, lying at anchor in the main channel of Boston harbor. After trial and conviction, the judges holding the Circuit Court, being divided in opinion as to their jurisdiction, certified the question to the Supreme Court of the United States. The third section of the Act of Congress of April 30, 1790, c. 9, 1 Stat. 112, provided:
>
> " 'That if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons on being convicted shall suffer death.'
>
> "Jurisdiction in the Circuit Court was claimed upon two grounds: First, the place where the murder was committed was within the admiralty and maritime jurisdiction of the United States; second, that the United States

ship of war Independence was a place, within the sole and exclusive jurisdiction of the United States. In reference to the last contention, Chief Justice Marshall, in delivering the opinion of the Court, said:

"'The objects with which the word "place" is associated are all, in their nature, fixed and territorial. A fort, an arsenal, a dockyard, a magazine, are all of this character. When the sentence proceeds with the words, "or in any place or district of country under the sole and exclusive jurisdiction of the United States," the construction seems irresistible that, by the words "other place" was intended another place of a similar character with those previously enumerated, and with that which follows. Congress might have omitted, in its enumeration, some similar place within its exclusive jurisdiction, which was not comprehended by any of the terms employed, to which some other name might be given; and therefore the words "other place or district of country" were added; but the context shows the mind of the Legislature to have been fixed on territorial objects of a similar character.'"

The District Court completely exhonerated the appellant from the charge of erecting an unlawful purpresture infracting the Rivers and Harbors Act; finding, expressly:

"That the said fish-trap so constructed or about to be constructed is a usual and ordinary fishing appliance such as is ordinarily used by those in catching salmon in the waters of Southeastern Alaska. That the portion of said trap nearest to the shore of Annette Island is situate 200 feet to seaward from the line of extreme low tide, and that although the said trap is in navigable water of the United States technically speaking, it is not within any portion of the

> waters of the United States which are, or ever have been used for the purpose of navigation, and is not in, and is not an obstruction to the navigable capacity of, any of the waters of the United States in the sense used in the Rivers and Harbors Act approved March 3, 1899." (Record, pp. 188-9.)

The decision of the Circuit Court of Appeals does not controvert the facts, but invokes the Rivers and Harbors Act as if it were a rigid law comprehending, and applicable to, all waters subject to the dominion of our Government; and regards as an unlawful purprestures all useful structures not authorized by the Secretary of War. And it ignores entirely the laws regulating fisheries in Alaska, which being special and subsequently enacted are, with respect to this case, superior to the Rivers and Harbors Act.

Proposition Five:

**The Government Has the Affirmative Side of the Issues Raised by the Pleadings; and the Burden of Establishing Equitable Ground for an Injunction**

The twelfth specification of error is important, only, because it points out the view of the case taken by the Circuit Court of Appeals indicated by the assertion in its opinion that, "the dominant question, as presented by the complaint and answer, is the right of the appellants to enter upon the waters mentioned in the complaint and erect the fish-trap at the place designated. (Record, p. 236.) This,

together with the argument based on the Rivers and Harbors Act, and the concluding paragraph of the opinion saying, "the appellants have acquired no right, vested or otherwise, to construct or maintain a fish-trap within the waters reserved by the President's proclamation," shows that the Court placed the appellant in the attitude of a suitor, having the burden of proof and required to establish a title, or special right, to occupy the fish-trap site. As if the administrative branch of the Government may command a party to evacuate premises in his possession and oust him of possession by judicial process, because he holds no muniments of title. Such a rule would be sound and rightfully applicable in a case for eviction of a squatter on that part of the public domain controlled, by virtue of law, by the executive branch of the Government; or if the party to be evicted were obstructing navigation; or in any case where exclusive possession by an individual or association of persons is wrongful per se.

In this case the fish-trap site is situated beyond the jurisdiction of the Land Department; it is not in the navigable part of the public waters; not appropriated nor claimed for a different use; it is suitable for a fish-trap site and nothing else; at the time when the appellant entered thereon and expended $4,000.00 in cost of constructing a fish-trap there was no law, regulation or proclamation forbidding it to do so; and the fishery laws enacted by Congress prohibiting the setting of fish-traps only

in designated localities, impliedly authorized the appellant to choose that site. Therefore, its selection and use of that site was and is lawful; and if it were required to assume the burden of proof and establish a special right of possession, affirmatively, the appellant has sustained that burden. But that burden was not cast upon it by the bringing of this suit; it is not a suitor praying for any affirmative relief; the Government is the plaintiff and to the same extent as any individual litigant bound to establish a valid cause of action and a right to the particular relief prayed for. Possession is the bone of contention; and the suit is in Equity. In such a case, in the forum of Equity, the theory on which the Circuit Court of Appeals formulated its decision is fallacious and led to an erroneous conclusion.

The rule respecting the burden of proof where the Government sues in Equity is concisely stated by this Court, in the case of *United States v. Stinson*, 197 U. S. 200; 25 Sup. Ct. 426; 49 L. Ed. 724, as follows:

> "The Government is subject to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

That was said with reference to a suit to cancel a patent granting land in which the Government was

suing in its own right as proprietor of the land; afortiori, the same rule applies with greater emphasis in a case like this, where the Government sues as a mere volunteer for the benefit of others having no color of right to the premises.

The same rule respecting the burden of proof has been invoked by this Court in a number of cases, so that it ranks among the settled principles of jurisprudence of the country.

*Maxwell Land Grant Case,* 121 U. S. 325, 379-381; 30 L. Ed. 949, 958-9; 7 Sup. Ct. 1015.
*United States v. Clark,* 200 U. S. 601, 608; 50 L. Ed. 613, 616; 26 Sup. Ct. 340.
*Diamond C. & C. Co. v. United States,* 233 U. S. 236; 59 L. Ed. 936, 939.
*Washington Securities Co. v. United States,* 234 U. S. 76, 80; 58 L. Ed. 1220, 1223.

Except in this case the same rule has been observed in the lower courts, including the Circuit Court of Appeals for the Ninth Circuit.

*Mountain Copper Co. v. United States,* 142 Fed. Rep. 629.
*Folk v. United States,* 233 Fed. Rep. 191-2.

There is nothing new in my argument; no original or progressive ideas to perplex the Court are relied upon; elementary principles of jurisprudence are deemed sufficient for reversal of the decree appealed from.

Respectfully, submitted,

C. H. Hanford,
Solicitor for Appellant.

# APPENDIX

## OPINIONS OF ATTORNEYS GENERAL.

### Vol. XVIII, p. 557.

Department of Justice,
February 28, 1877 (1887).

Sir:

Your letter of the 24th instant, with the accompanying inclosures, presents for consideration the statement that a body of about one thousand Indians who are natives of and residents within the limits of British Columbia, about 20 miles from the line of Alaska, who have attained an advanced state of civilization, are self-supporting, and are organized into a community governed by a council, wish to emigrate into Alaska. You inquire, "Whether the Indians as above described can go into Alaska as emigrants and then secure such rights as are accorded to the residents of that Territory who are not Indians; and as they wish to go as a colony, whether, under existing laws, it would be competent for the President to set aside as a reservation for such colony such reasonable portion of unoccupied land in that Territory as they may select for their location."

Immigration of peaceful individual Indians who have dissolved tribal relations is not prohibited by statute and is not inconsistent with the general policy of our Government, but a band of Indians born within the United States, who maintain their

tribal relations, is regarded by the law substantially as an independent domestic nation under the guardianship of the United States. If such tribe be born and reside outside of the United States, and still maintains the tribal or national character, it can not be entitled to emigrate and locate on public lands of the Government; for the very fact of a national existence implies possession of a place of habitation, laws, customs, or traditions of government, with some or all of the attributes of a body politic. Such a people thus organized, locating upon a body of public lands, would exclude such occupancy and enjoyment as is contemplated by our land laws by such persons as are entitled to purchase and appropriate, or subject them to usages, customs, and traditions inconsistent with the general laws. The permanent guardianship or supervision of such a domestic dependent nation can not be assumed by the executive department of the Government without the authority of positive laws, except as to those Indians who are born within the United States. If the Indians referred to in yours should as distribed individual Indians immigrate, the rights of such individual Indians would not in any respect rise higher that (than) those of any other foreigner, and they would be much less than foreign white emigrants, because the provisions of law for naturalization would not apply to them. The provisions of the homestead law, by the fifteenth section of the Act of the 3d of March, 1875 (18 Stat., 420), which extended the benefits of the homestead law to Indians who have

abandoned the tribal relation properly qualified, is limited in its operations to Indians "born in the United States." The proviso to the eighth section of the Act of the 17th of May, 1884 (23 Stat., 26), only reserves in Alaska the rights of Indians and other persons then in possession or claiming lands therein. There seems to be no provision of law assuring to such foreign Indians any legal right to acquire lands. The general land laws of the United States, except the mining laws, have not been extended to Alaska. The President then, can not by virtue of any necessity arising in the administration of those laws set aside a reservation. His power to declare permanent reservation for Indians to the exclusion of others on the public domain does not extend to Indians not born or resident in the United States. The case you submit does not come within the scope of any power granted to the Executive; but while the present policy of the Government and tendency of legislation is to aid and encourage the Indian tribes to advance in civilization and enlightenment, so that at no distant period they may be qualified to become a part of the homogeneous mass of the American people, skilled and educated in the arts of peace, with all the rights and privileges of citizenship, if the case submitted be one properly the subject of relief, that relief must be sought at the hands of Congress.

Very respectfully,

A. H. GARLAND.

The Secretary of the Interior.

**Excerpt From Congressional Record of June 27, 1916, p. 10046.**

In the original issue of the Record, not bound, this was found on page 11555.

"Mr. NELSON—Mr. President, I offer the amendment I send to the desk, to come in at the end of line 26 on page 122.

"The VICE-PRESIDENT—The amendment will be stated.

"The SECRETARY—On page 122, at the end of line 26, it is proposed to insert:

"'For the purpose of encouraging industry and self-support among natives of Alaska, and of assisting them in the establishment of small industrial enterprises, $25,000, or so much thereof as may be necessary, to be immediately available and to remain available until expended, which sum may be used for the erection and repair of buildings, purchase and repair of machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable the natives of Alaska to become self-supporting: Provided, That said sum shall be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States on or before June 30, 1926, and any such sums so reimbursed are hereby reappropriated and made available for expenditure, in the discretion of the Secretary of the Interior, prior to June 30, 1926, for the purposes above indicated. The Secretary of the Interior shall annually submit to Congress on the first Monday in December a detailed report of all moneys received and expended hereunder for the purpose of encouraging industry and self-support among natives of Alaska.'

"Mr. NELSON—Mr. President, this is estimated for in the Book of Estimates, and for

that reason, unless objection is made, I am unwilling to take up the time of the Senate in debating it.

"The PRESIDING OFFICER (Mr. Overman in the chair)—Is there any objection to the amendment?

"Mr. MARTIN of Virginia—My attention was diverted, so I shall be obliged if the Senator will briefly state what he proposes to do. There were several Senators talking to me.

"Mr. NELSON—My statement was, Mr. President, that this has been estimated for in the Book of Estimates; and in view of that fact, unless particular objection is made, I am unwilling to take up the time of the Senate in discussing the merits of the amendment.

"Mr. MARRTIN of Virginia—I will ask the Senator what is the purpose of the appropriation? I understand it is $25,000.

"Mr. NELSON—It is for the purpose of relieving what is known as the Father Duncan Colony of Indians on the Annette Islands in Alaska. It is in the Book of Estimates.

"Mr. MARTIN of Virginia—On the judgment of the Senator from Minnesota I will make no objection to it, though, of course, we will have to investigate it when we get it into conference. I am entirely without information on the subject. I make no objection to it. It is estimated for, and I make no objection to it.

"The PRESIDING OFFICER—The question is on agreeing to the amendment.

"The amendment was agreed to.

"Mr. JONES—In connection with the amendment of the Senator from Minnesota, I wish to put some facts into the Record, in order that the conferees may have before them in the consideration of the item.

"The PRESIDING OFFICER—Without objection, it will be so ordered.

"The matter referred to is as follows:

"In August, 1887, William Duncan, an independent missionary, working among the Tsimpsean Indians of British Columbia, brought to the Annette Islands, in the southeastern part of Alaska, a colony of between 800 and 1,000 of these Indians from the old town of Metlakahtla, in British Columbia.

"By the act of March 3, 1891 (26 Stat., 1101), Congress set apart Annette Islands for the use and occupancy of these Indians, under such rules and regulations and subject to such restrictions as might be prescribed from time to time by the Secretary of the Interior.

"Under the leadership of Mr. Duncan, this colony made rapid progress. The heads of families of the colony built good homes on lots set apart for them, a large church house was built, a schoolhouse, and other public buildings. A salmon cannery and a sawmill were established, first through the co-operation of Mr. Duncan, the Indians, and philanthropic persons in the United States. Later Mr. Duncan bought the interests of these persons and of the natives and ran the cannery and the sawmill as his personal property and employed native labor.

"In recent years Mr. Duncan, who is now 84 years old, has lost his control over the Indians, and the cannery and sawmill have not been operated within the last four years. Since these industries closed the Indians have no means of making a living on the island and have had to go away for employment. The school had also been closed. Four years ago the Government established in the village of Metlakahtla a school, which it now maintains with five teachers. In order to give the Metlakahtlans an opportunity for self-support on the island, the Secretary of the Interior decided last winter to put the cannery and the sawmill again in operation. To this end the cannery building was leased for a

term of five years, beginning April 1, 1916, to P. E. Harris, a cannery operator of Seattle, Wash., on terms which it was estimated would produce an annual income of $7,500 for the village and at the same time give employment to a large percentage of the inhabitants.

"On May 17, while necessary repairs on the building were being made by the lessee and while he was awaiting the arrival of new machinery, the cannery building was completely destroyed by fire, as were also the warehouse and a portion of the wharf. Because of this loss by fire the lease is rendered ineffective. The Secretary is unable to require the lessee to fulfill its terms.

"The natives are, therefore, again without any means of support on the island, nor is there any way of providing for such support until the cannerey can be replaced and the sawmill repaired. There is also pressing need for the repair of the pipe line which brings water from a mountain lake to the village, and without which there is no adequate supply of water either for drinking or for protection against fire.

"It is therefore urged that the $25,000 recommended as a reimbursable fund for use in aiding the natives to establish industries (Book of Estimates, 1917, p. 953), but not allowed by the House, be appropriated with the understanding that its first use shall be for the rebuilding of the cannery and the repairing of the sawmill and the pipe line at Metlakahtla and for assisting the natives in the operation of these industries.

"FACTS IN REGARD TO METLAKAHTLA AND THE IMMEDIATE NEED OF A REIMBURSABLE FUND.

"(1) Until the close of the industries four years ago about 800 Indians lived on the island.

Every family had a good home. Most of the houses had from four to eight rooms. There were many smaller industries dependent on the cannery and the sawmill.

"(2) After the close of the industries many families moved away, and many of them have taken up permanent homes in places not so desirable as Metlakahtla would be if the industrie were re-established. All do leave the island for work in the summer except a few old men and women. When they leave they must carry their children with them. Last summer when fire occurred in the village only two Indians were on the island, and the village would have been destroyed but for the presence of two Government school teachers and a young Indian who had come over from Ketchikan for the night. The nearest place at which employment can be had is 15 miles away. When the Indians leave the island they must abandon their houses and lose their value, as they cannot be sold.

"(3) After the Government school was established and there was hope for profitable employment on the island the Indians began to return, and there was an increase of approximately 100 in the population within a year.

"(4) The burning of the cannery has almost produced a state of despair among the Indians. The island will be rapidly deserted if the cannery is not rebuilt.

"(5) With the $25,000 asked for as a reimbursable fund, the cannery can be rebuilt and equipped, the sawmill repaired to produce lumber for the cannery, and the pipe line repaired to bring water for the use of the village, the cannery, and the sawmill.

"(6) The operation of the cannerey and the sawmill will enable the Indians to remain at home during the summer, cultivate their gardens, conduct co-operative stores, and maintain other small industries.

"(7) The operation of the cannery, mill, and other industries will enable the village to repay to the reimbursable fund at least $5,000 a year, which can be used to assist other native villages in establishing small industries. It will also provide, in addition to this, a small income for much-needed improvements in the village.

"THE HYDABURG COLONY.

"By executive order, June 19, 1912, a tract of approximately 12 square miles on the west coast of Prince of Wales Island, in southeastern Alaska, was reserved for the use of a colony of natives who had migrated thither from the villages of Klinquan and Howkan and founded a settlement, which they named Hydaburg. Under the supervision of the teacher of the United States public school, the Hydaburg Trading Co. was organized to transact the mercantile business of the settlement and the Hydaburg Lumber Co. to operate a sawmill. The Hydaburg people have turned a dense forest into a thriving little town, with a busy wharf, a sawmill that turns them out good lumber at a cost of $10 a thousand; neat, single-family homes instead of the communal houses in which they lived in their old villages; a long, boarded street, of which they are proud as the finest in Alaska; and a co-operative store, which the first year made a clear profit of 125 per cent., paying a cash dividend of 50 per cent. and adding 75 per cent. to the capital stock."

**Decisions of the Department of the Interior Relating to the Public Lands. Volume 44, p. 441. June 29, 1915.**

INSTRUCTIONS—COMMISSIONER TALLMAN, APPROVED BY FIRST ASSISTANT SECRETARY JONES, TO THE COMMISSIONER OF EDUCATION.

This office is in receipt of your (Commissioner of Education) letter of October 2, 1914, with which you submitted five enclosures, one of which was a letter from District Superintendent of Schools, W. G. Beattie, dated at Juneau, Alaska, September 7, 1914, containing recommendations relative to the use of tide lands in front of the Auk Indian village. Referring to Mr. Beattie's recommendations, you stated that you desire this office to advise you (1) whether or not it is feasible to reserve, for a landing place for the water craft of the natives of Juneau, the tract described by Mr. Beattie; (2) whether or not Mr. A. A. Gabbs, who appears to own a forty-three foot frontage in the native village, can control the tide land in front of said frontage; (3) whether or not the road which has been built across the tide flats by the town of Juneau can, by sufferance, be permitted to remain; and (4) whether or not the natives of the Juneau Indian village can be permitted to occupy that part of the tide flats lying between the line of high tide and the road that has been built across the flats by the town of Juneau.

Mr. Beattie in his letter of September 7, 1914, addressed to the Secretary of the Interior, referred to the fact that Special Agent W. J. Lewis of this office had made an investigation relative to the tide

land conditions at Juneau, Alaska. This office is in receipt of a report from Special Agent Lewis, dated at Juneau, Alaska, May 29, 1914, in which he recommended that a certain portion of the tide flats at Juneau be reserved as a landing place for the native Indians. Special Agent Lewis also submitted another report under date of May 26, 1914, in which he set forth the facts relative to the building conditions along the water front at Juneau and the encroachments by certain persons by the placing of piling and other structures upon the tide flats. On July 15, 1914, Chief of Alaskan Field Division, A. Christensen, of this office, transmitted a copy of a resolution signed by the President of the Council and ex-officio Mayor of Juneau, under date of June 19, 1914, setting forth the necessity for the construction of a roadway over the tide flats and in front of the Juneau water front, and requesting the Department of the Interior to permit the city to construct the same. A letter from the Governor of Alaska, addressed to the Secretary of the Interior under date of July 9, 1914, also accompanied the resolution. In the latter letter it was stated that after careful investigation of the statements contained in the above referred to resolution, the writer desired to recommend that permission to construct the roadway be granted, with the clear understanding that due and ample provision should be made reserving for the Indians ingress and egress for their fishing boats and canoes.

Among the inclosures submitted with your letter

of October 2, 1914, *supra,* was a copy of a telegram from the Governor of Alaska, dated August 21, 1914, in which he stated that the above referred to roadway over the tide flats had been completed and in which he recommended that Mr. Beattie be designated to look after the rights of the natives, and a copy of a telegram addressed to Mr. Beattie at Juneau, Alaska, by the Assistant Secretary of the Interior, under date of August 24, 1914, designating Mr. Beattie to look after the rights of the natives in the matter of the tide lands controversy and directing him to consult with the Governor of Alaska and the District Attorney.

In view of the importance of this matter in relation to equities which may require consideration in the future, this office has given careful consideration to the propositions contained in the questions which you desire this office to answer as set forth in your above referred to letter.

The shore or the foreshore as described in the common law of England, is that ground which is between the ordinary high water mark and low water mark. In England the question of title to this area bordering upon the sea and upon rivers where the tide ebbs and flows, caused much controversy and was for a long period of time not legally settled.

Under the early English common law the judges were inclined to hold that the title of riparian owners extended to low water mark. That holding was, however, gradually overruled until finally under the later English common law the judges established

the doctrine that the title to the foreshore was vested in the Crown, subject to cetrain public rights, unless the riparian owners could produce evidence to show that it had been acquired by them under some grant expressed or implied. See Farnham on "Waters and Waters Rights," Volume I, Chapter 4. The common law of England upon this subject which was adhered to at the time that the English Colonies in America were established, was adopted and at that time the later doctrine had prevailed. The common law of England, therefore, has since been adhered to except in so far as it has been modified by the charters, constitutions, statutes, or usages of the several Colonies and States, or by the Constitution and laws of the United States. See *Shively v. Bowlby,* 152 U. S., 1. It has become the settled rule of law as laid down by the United States Supreme Court that upon the acquisition of territory the United States acquires title to the tide lands equally with the title to the upland, but that with respect to the former the Government holds it only in trust for the future States that might be erected out of such territory. See *Knight v. United States Land Association,* 142 U. S. 183. Having once rightfully acquired territory the United States under the Constitution is the only Government which can impose laws upon such territory, and it, therefore, has entire dominion and sovereignty, national and municipal, federal and state, over such territory, so long as it remains in a territorial condition. *American Insurance Company v. Canter,* 1 Peters, 511, 542.

In this respect, however, the United States as has been said above, merely holds the tide lands or foreshore as trustee for the benefit of the future State or States afterwards to be carved out of the territory. Congress has, however, the power to make grants of tide lands whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce or to carry out other public purposes appropriate to the objects for which the United States holds such territory but Congress has never undertaken to dispose of tide lands under general laws. Congressional grants of portions of the public domain which border the mean high water mark of navigable waters do not convey of their own force any title or right to the lands below the mean high water mark, and they do not in anywise impair the title and dominion of the future State when it shall be created. See *Wright v. Seymour,* 69 Cal., 122; *Weber v. Harbor Commissioners,* 18 Wall., 64; and *Mann v. Tacoma Land Company,* 153 U. S., 273. When the United States acquired the Territory of Alaska by purchase it assumed undisputed dominion thereover and became the owner of all the lands therein. The provisions of the general land laws of the United States were not applicable to it and the settlers afterwards settling upon land within that Territory acquired no title in the soil. By the act of May 14, 1898 (30 Stat., 409), Congress extended the homestead laws to the District of Alaska and made provision for the

disposition of the public lands therein under certain conditions. It expressly stated, however, in the third proviso of section 2 of that act that no rights which should be acquired thereunder were to any way impair the title of any State or States that may hereafter be erected out of the District of Alaska to tide lands and beds of navigable waters, it being declared that the same shall continue to be held in trust by the United States for the future State or States which may hereafter be created. Said act did not, therefore authorize the disposition of the foreshores or tide lands in Alaska, and without some express legislation authorizing the disposition of such lands the title thereto cannot be acquired. As stated above Congress may, however, dispose of the foreshores or tide lands if it considers it expedient to do so. Such has been done in at least one case in Alaska. See the act of February 6, 1909 (35 Stat., 598), authorizing the disposition of tidal land at Cordova Bay.

By the fifth proviso of section 10 of the act of May 14, 1898, *supra*, the Secretary of the Interior was directed to reserve for the use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, or seashore to be used for landing places for canoes or other craft used by such natives.

Your first question is whether or not it is feasible to reserve for a landing place for the water craft of the natives of Juneau the tract described by Mr. Beattie in his letter of Sepetmber 7, 1914, *supra*. In

reply to that inquiry I will state that if said tract can be reserved at all it must be reserved under the authority contained in the fifth proviso of section 10 of the act of May 14, 1898, *supra*. The tract described by Mr. Beattie appears to be a portion of the tide land area in front of the Auk Indian village. The question relative to the authority of the President to temporarily withdraw lands in Alaska by virtue of the aforesaid proviso, and also by virtue of the provisions of the act of June 25, 1910 (36 Stat., 847), has previously been considered by this office and by the Department of the Interior. In a case involving the question relative to the authority of the Executive to withdraw certain tide lands at Ketchikan, Alaska, for the use of natives for landing places for canoes and other craft, a question similar to that involved in Mr. Beatties recommendation, this office took the view that such authority had not been conferred by the provisions of the fifth proviso of section 10 of the act of May 14, 1898, or by the provisions of the act of June 25, 1910, *supra*, and on June 23, 1914 (D-29055), the First Assistant Secretary issued instructions to this office in which its views were sustained. In view of the above referred to holding, the proposed reservation suggested by Mr. Beattie can not be made.

Referring your second inquiry, it appears, according to the foregoing statement of the law relative to the extent of the boundaries of a riparian owner with reference to the foreshore, that said A. A. Gabbs has no proprietorship in the tide lands in

front of his property. Under the law of littoral ownership, however, as it exists in the Territory of Alaska, a grant of land bordering on or bounded by navigable waters conveys to the grantee a free and unobstructed access to such waters.

14

FILED
OCT 14 1918
JAMES D. MAHER,
CLERK

IN THE

# Supreme Court of the United States

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No. 212

ALASKA PACIFIC FISHERIES, a Corporation,
Appellant

vs.

THE UNITED STATES OF AMERICA.

---

Appeal from the United States Circuit Court of Appeals
For the Ninth Circuit.

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# REPLY BRIEF.

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA.

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## REPLY BRIEF.

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The appellant's statement of facts stands uncontroverted and the few minor facts noted on page 9 of the answering brief are not important. What the Mayor of Annette Island did in granting permits for fish-traps in the year 1915 under regulations of the Secretary of the Interior does not prove that the Metlakahtla Indians had an exclusive right by prescription to fish in the waters around that Island; nor raise a presumption of wrongfulness in constructing a trap without such permit. The law does not confer upon the Mayor of Annette Island

any authority to control fishing rights in Alaska, nor recognize any such functionary, nor authorize the Secretary of the Interior to make regulations respecting fish-traps or fishing rights in Alaska. On the contrary jurisdiction of the fisheries in Alaska is by law vested in the Secretary of Commerce. (See Alaska Fishing Law, 34 U. S. Stat. 478.)

If it were true that the Government must operate a "commercially successful cannery" for the Metlakahtlans, still necessity does not require confiscation of appellant's trap nor appropriation of its site as if it were the only one available. That location was vacant after the three for which trap permits were granted in 1915 had been pre-empted. In fact the only reason for wishing to evict the appellant is the desire to suppress competition.

In its entirety the argument contained in the answering brief is an attempt to obliterate differences. It ignores the difference, in substance and adaptation for use, between land and navigable water. It mingles the legislative and executive functions of our Government in utter disregard of the constitutional distribution of powers. And it treats the alien emigrants from British Columbia as being, equally with native Indians, part of the white man's burden resting upon our national government.

Notwithstanding the plain, positive and oft repeated declarations of this Court restricting congressional grants of land to actual land above the line of ordinary high water, as in the cases of *Shively v. Bowlby* and *Mann v. Tacoma Land Com-*

*pany*, the argument proceeds by a series of links constituting a chain of propositions culminating in an assumption on page 34 that, the Act of March 3, 1891, contemplated not only the reservation of the uplands of "that body of lands known as Annette Islands" but also the adjacent waters and, fairly construed, was a lawful reservation for a public purpose.

The first link is an abstract proposition that—parts of the public domain can be set aside to be used for public purposes, which is true and it is proved, by citations of cases deciding questions of title *to land* and the power of *Congress* to determine how the trust appertaining to the public domain shall be administered.

The second link is an assertion that the reservation for these Metlakahtla Indians was for a public purpose, which is not true because, it withdrew from the general public all right to occupy or use land, in which all the people had a common interest, for the exclusive advantage and benefit of a few to whom the Government owed no duty. The case of *United States v. Rickert*, 188 U. S. 432, is not an authority in point because it related to beneficent objects with reference to native Indians that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it is promised, there arises the duty of protection and with it the power."

The third link is an assertion that the United

States has a title in the locus which it can grant even to individuals. By "locus" is meant the site of appellant's trap, situated in deep water in a wide navigable waterway 200 feet distant from the line of extreme low tide. The rules and principles affecting shore lands are not applicable. No authority for a grant to an individual of space in navigable water off shore is cited, but there is a quotation from *Shively v. Bowlby*, stating the extent of the limited power of *Congress* to make grants of land below high-water mark for specified uses "or to carry out other public purposes appropriate to the objects for which the United States holds the territory." There is also a sentence quoted from *Light v. United States*, which together with the next following sentence, necessary to express the meaning intended, is as follows:

> "It is not for the Courts to say how that trust shall be administered. That is for Congress to determine."

In this connection it is in order to consider what action Congress has taken in the matter of administering the trust appertaining to shore and submerged lands under navigable water in Alaska. Long anterior to the date of the President's proclamation, Congress by a law declared that class of lands in Alaska to be reserved and held for the State or States to be in the future created out of that territory. See Act of May 14, 1898, 30 U. S. Stat. 409, Compiled Laws of Alaska, 1913, Sec. 92.

The fourth link is a surprising statement that,—If the United States can make an absolute grant of the bed of these waters to an individual, it can make a reservation thereof until otherwise provided by law for the established public purpose of providing for the support and development of a very considerable body of "wards of the Nation" toward whom it owes the duties and with respect to whose protection it has the power. This is surprising because it is not true that the Metlakahtlans are wards of the Nation and not true that the United States owes any duties to them to provide for their support or development. Instead of being an established fact that such relation and duties existed, Congress has treated them as aliens, in and by the reservation and the act permitting them to become licensed navigators of steam vessels, and the executive branch of the Government recognized and treated them as aliens ineligible to become wards of the Nation in and by Attorney General Garland's opinion denying the power of the President to set apart public land for them to occupy. 18 Opinions of Attorneys General, 557.

The next link is the very extraordinary statement in the opinion of the Circuit Court of Appeals, that, the reservation protects the food supply of a whole tribe of Indians and other native Indians, and provides means for their support, and, the measure is a public concern for the benefit of the whole people. If this were true then any monopoly which yields a living and keeps the beneficiary from becoming a

pauper is a matter of public concern and for the benefit of the whole people.

The next link is an argument based on the treaty whereby Alaska was ceded to the United States, which, if sound, would exclude the common law and the Constitution of the United States from that Territory, leaving it subject to the same system of autocratic and bureaucratic government which prevailed there when Russia owned it.

That argument is refuted by the decision of this Court in *Rasmussen v. United States*, 197 U. S. 516; and by Section 796 of the Compiled Laws of Alaska, 1913, which reads as follows:

> "Sec. 796. So much of the Common Law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be law within the District of Alaska."

The seventh and last link in the chain is a denial of any common right of fishery that is effective against the right of the United States to make a reservation of water for a public purpose.

As an abstract proposition that may be conceded, but it has no significance in this case. In order to apply it to a concrete case analogous to this case it must be assumed that special monopolistic advantages constitute the public purpose and the reservation to have been made capriciously in a way to wantonly destroy property. Thus modified it would not be true.

Every link in this chain is faulty and the effort to validate the proclaimed reservation by construing the Act of Congress as a grant of monopolistic fishing rights is condemned by all the Supreme Court decisions which deny the right to add, as appurtenances to land, proprietary rights in adjacent water.

The answering brief assumes that if the Act of Congress may not be construed to make a reservation of waters adjacent to the body of lands which it designates, the President's proclamation was an effective exercise of the power of the United States to reserve such adjacent waters. In other words the proclamation is a grant of exclusive right which Congress in legislating upon the subject withheld. On page 34 it is said that, "it is of little moment whether that exercise was by the Congress or by the Executive or under their combined powers." Citing *Tiaco v. Forbes*, 228 U. S. 549, a case which comes no closer to the point than any one of many in which the Courts have non-suited civil actions for damages against peace officers for exercise of authority without malice.

The implied power of the President conceded by decisions in the line of cases beginning with *Wolcott v. Des Moines*, including *Grisar v. McDowell*, *United States v. Leathers* and *Donnelly v. United States*, and ending with *United States v. Midwest Oil Co.*, is the power of a general agent to transact business within the scope of his agency. The President is the general agent of the United

States in charge of its proprietary interests in public land and is its representative in the execution of its trust as guardian of the native Indians who are its dependents. That agency does not comprehend the fisheries in public waters off shore and beyond the limits to which the system of land surveys may extend.

The appellant has no muniment of title in the form of a permit or license for its trap granted by the Secretary of War or the Mayor of Annette Island, therefore, it is charged as being a trespasser having no rights whatever in the premises. If that charge were true, technically, the suit being in equity the Court would be in duty bound to consider the actual injustice of such an attack as this upon a commendable enterprise, and destruction of property devoted to a public use of transcendent importance as the production of food is at the present juncture regarded throughout the civilized world.

But the appellant has a valid right to the trap which it created and to the site which it occupies, for by referring to the Alaska fishing laws enacted by Congress the Court will find, what the author of the answering brief appears to have overlooked, viz.: That among the things forbidden by that law is molestation of or encroachment upon the space immediately surrounding fish-traps in Alaska.

It is there provided that:

> "It shall be unlawful to * * * drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally

or within one hundred yards endwise of any other trap or fixed fishing appliance."

This compels respect for trap rights acquired by priority of appropriation of trap locations and necessarily legalizes those appropriations of sites made with due observance of the law's provisions.

The appellant is criticized as if it were in one breath complaining of a granted monoply and in the next asserting monopolistic rights as exclusive proprietor of a space within public fishing ground. This is hypercritical. Every fishing smack that goes to fishing ground out in the broad ocean and every sportsman who casts a fly in a stream or lake in the mountains has a right to occupy exclusively a certain space without being obnoxious to the charge of being a monopolist; the Alaska fishing laws do not regard fish-trap owners as monopolists and their rights are not comparable to an exclusive right to fish within a wide zone surrounding a large island.

The appellant earnestly prays for relief against the injustice of the injunction granted by the lower Courts.

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*Solicitor for Appellant.*

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*Of Counsel.*

# INDEX.


| | Page. |
|---|---|
| STATEMENT OF THE CASE | 1–13 |
| I. THE FACTS | 2 |
| II. THE CONTENTIONS OF THE PARTIES | 11 |
| III. THE ISSUES | 13 |
| ARGUMENT: | |
| I. THE POWER TO EXCLUDE FROM THE WATERS IN QUESTION ALL PERSONS EXCEPT THE METLAKAHTLA INDIANS AND SUCH ALASKAN NATIVES AS SHOULD JOIN THEM IN RESIDENCE WAS IN THE GOVERNMENT OF THE UNITED STATES | 14–35 |
| A. *The Power of the Government to Reserve Portions of the Public Domain for the Exclusive Use of Indian Tribes is Undoubted* | 14 |
| 1. Parts of the Public Domain Can be Set Apart for Public Purposes | 14 |
| 2. A Reservation for these Indians is a Public Purpose | 15 |
| B. *The Locus in Question is a Part of the Public Domain Within this Rule* | 17 |
| 1. The United States has a Title in the Locus Which It Can Grant Even to Individuals | 17 |
| 2. *A fortiori*, the United States Can Reserve the Locus For the Exclusive Use of These Indians | 19 |

ARGUMENT—Continued.
B. *The Locus in Question is a Part of the Public Domain Within this Rule*—Continued.
3. No rights of Appellant as a Member of the General Public Limit the Power of the Government to Reserve These Waters ..... Page. 20
a. This is settled by *Shively* v. *Bowlby*, 152 U. S. 1 ..... 20
b. It is manifest on principle ..... 21
i. Such a general right (e. g. of fishery) if existing at Common law is inapplicable to these waters ..... 22
ii. There is no such general right effective against a reservation like that here ..... 24
II. THE ACT OF MARCH 3, 1891, FAIRLY CONSTRUED, RESERVED THE WATERS IN QUESTION ..... 34–36
III. IN ANY EVENT, THE PRESIDENT'S PROCLAMATION OF APRIL 28, 1916, WAS AN EFFECTIVE EXERCISE OF THE POWER OF THE GOVERNMENT TO MAKE SUCH A RESERVATION ..... 36–39
A. *The Authority of the President to Reserve Portions of the Public Domain for Particular Public Purposes Has Long Been Established* ..... 37
B. *The Proclamation Was Within the Authorization of Section 465, Revised Statutes* ..... 40
IV. THE APPELLANT HAD NO VESTED RIGHTS EFFECTIVE AGAINST THE ACTION OF THE GOVERNMENT ..... 40–43
A. *No Such Rights Resulted from Its Beginning to Build its Trap Before the Proclamation Was Made* ..... 40
B. *It Gained No Such Rights by Not Violating Chapter 3, Compiled Laws of Alaska, Nos. 261, 262* ..... 42

ARGUMENT—Continued.

V. APART FROM THE POWER OF THE GOVERNMENT TO RESERVE THE LOCUS FOR THE EXCLUSIVE USE OF THE INDIANS, THE GOVERNMENT WAS ENTITLED TO THIS INJUNCTION ..... Page. 43–44

A. *The Appellant Was a Mere Trespasser* ..... 43

B. *The Appellant's Trap Was Erected in Violation of the Rivers and Harbors Act of 1899* ..... 43

CONCLUSION ..... 44

## CASES CITED.


| | Page. |
|---|---|
| *Alaska-Pac. Fisheries* v. *U. S.*, 240 Fed. 274 | 20 |
| *Arnold* v. *Mundy*, 6 N. J. Law 1 | 24, 28, 29, 32 |
| *Butte City Water Co.* v. *Baker*, 196 U. S. 126 | 14 |
| *Camfield* v. *U. S.*, 167 U. S. 524 | 14 |
| *Cherokee Nation* v. *Georgia*, 5 Peters 1 | 17 |
| *Donnelly* v. *U. S.*, 228 U. S. 243 | 16, 31, 35, 36, 37 |
| *Donnelly* v. *U. S.*, 228 U. S. 708 | 32 |
| *Grisar* v. *McDowell*, 6 Wall. 363 | 15, 37, 38 |
| *Hardin* v. *Jordan*, 140 U. S. 371 | 26 |
| *Hoboken* v. *Penna. R. R.*, 124 U. S. 656 | 28 |
| *Illinois Central R. R.* v. *Chicago*, 146 U. S. 387 | 32, 33, 34 |
| *Illinois Central R. R.* v. *Chicago*, 176 U. S. 646 | 26 |
| *Kansas* v. *Colorado*, 206 U. S. 89 | 14 |
| *Light* v. *U. S.*, 220 U. S. 523 | 14 |
| *Lincoln* v. *Davis*, 53 Mich. 375 | 30 |
| *Mann* v. *Tacoma Land Co.*, 153 U. S. 273 | 19, 20 |
| *McCready* v. *Virginia*, 94 U. S. 391 | 29 |
| *Packer* v. *Bird*, 137 U. S. 661 | 26 |
| *Penna. R. R. Co.* v. *N. Y. &c. R. R.*, 23 N. J. Eq. 157 | 28 |
| *Russian Am. Co.* v. *U. S.*, 199 U. S. 570 | 41 |
| *Shively* v. *Bowlby*, 152 U. S. 1 | 17, 20, 25, 26, 28, 32, 33 |
| *Stearns* v. *Minnesota*, 179 U. S. 243 | 14 |
| *Stevens* v. *Patterson*, 5 Vroom (N. J.) 532 | 28 |
| *Stockton* v. *Balto. &c. R. R.*, 32 Fed. 9 | 34 |
| *Strothers* v. *Lucas*, 12 Pet. 410 | 23 |
| *Tiaco* v. *Forbes*, 228 U. S. 549 | 35 |
| *U. S.* v. *Kagama*, 118 U. S. 375 | 17 |
| *U. S.* v. *Leathers*, 6 Sawy. 17 | 37, 40 |
| *U. S.* v. *Midwest Oil Co.*, 236 U. S. 459 | 38 |
| *U. S.* v. *Payne*, 8 Fed. 883 | 37 |
| *U. S.* v. *Rickert*, 188 U. S. 432 | 15 |
| *U. S.* v. *Trinidad Coal Co.*, 137 U. S. 160 | 19 |
| *Webber* v. *Harbor Comrs.*, 18 Wall. 57 | 41 |
| *Wolcott* v. *Des Moines*, 5 Wall. 681 | 37 |
| *Woolsey* v. *Chapman*, 101 U. S. 769 | 37 |
| *Worcester* v. *Georgia*, 6 Peters 515 | 17 |
| *Opinions of Attorney General*, vol. 17, p. 258 | 16, 37 |

## INDEX OF STATUTES.


Page.

26 Stat. 1095 ..... 4, 8, 11, 35
30 Stat. 409 ..... 6
34 Stat. 1411 ..... 6
30 Stat. 1121, 1151 ..... 10, 11, 12
15 Stat. 539 ..... 22
13 Stat. 39 ..... 31
R. S. §465, 39 Stat. 352 ..... 6, 39, 40
Compiled Laws Alaska 1913, §261, 262, 271 ..... 42
President's Proclamation, Apr. 28, 1916 ..... 7, 8, 36
Russian Civil Code ..... 23
Elements de Droit Civil Russe (Lehr) ..... 24
Maine, chap. 45, secs. 17, 18, Rev. Stat. 1916 ..... 26
New Hampshire, Pub. St. Ch. 133, secs. 20, 21 ..... 26
Massachusetts, Rev. Laws 1901, ch. 91, secs. 100, 101, 104, 105 ..... 26
Rhode Island, Gen. Laws 1909, Title XX, ch. 203 ..... 26
Connecticut R. S. 1902, secs. 3214, 3215 ..... 26
New York, Laws 1912, ch. 318, secs. 300, 304 ..... 26
New Jersey, R. S. 1911, vol. 2, secs. 38, 59, 63, 80, 163 ..... 26
Delaware, Rev. Code 1915, secs. 2421, 2422, 2423, 2430, 2431, 2464 ..... 26
Maryland, Bagby's Ann. Code 1911, Art. LXXII, secs. 1, 20 ..... 26
Virginia Ann. Code 1904, secs. 1338, 2130c ..... 26
North Carolina, Pell's Revisal 1908, secs. 2371 et seq ..... 26
South Carolina, Code 1912, secs. 893, 909 ..... 26
Georgia, Park's Ann. Code 1914, sec. 1943 ..... 26
Florida, Compiled Laws 1914, secs. 651a, 651j ..... 26
Alabama, Political Code 1907, secs. 1581, 1586, 1588 ..... 26
Mississippi, Hemingway's Code 1917, ch. 147, secs. 6133 et seq ..... 27
Louisiana, Marr's Ann. R. S. 1915, vol. 3, secs. 5330–5332 ..... 27
Texas, Meachin's Civ. Stat. Ann. 1913, Art. 3980, 3986 ..... 27

# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ALASKA PACIFIC FISHERIES, APPELLANT,
*v.*
THE UNITED STATES OF AMERICA. } No. 212.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the District Court of the United States for the District of Alaska, Division No. 1. By the decree so affirmed, appellant is enjoined from maintaining a fish trap or any other structure in the waters off Annette Island, Alaska, within 3,000 feet of the line of mean low water and from fishing in those waters. Appellant was also ordered to remove any structures theretofore so erected. (R. 196, 197.)

The case was heard upon an order to show cause and it was agreed (R. 175) that the affidavits, oral testimony, and exhibits then submitted should be taken as all the evidence and that, upon it, the case should be determined upon the merits. This testimony appears in the record, pages 51–181. Few matters of fact were in substantial dispute, and while appellant says (R. 255) that it continues to rely upon certain assignments of error predicated upon the action of the trial judge in dealing with the facts, no point seems to be made of these assignments in appellant's brief in this Court. The case was heard in part on oral testimony. Its value the trial judge was, of course, best able to determine. His findings of fact have once been reviewed without disapproval by the Circuit Court of Appeals which sets out in its opinion (R. 228–240) practically everything which appears important. In view of these circumstances, no extended review of the evidence bearing upon the matters, for the most part minor in character, which were subjects of dispute in the proceedings below, appears to be necessary. The decision in the Circuit Court of Appeals is reported in 240 Fed. 274.

## I.

### The Facts.

To understand the significance of the action taken by the Congress and the President out of which the present suit arose and justly to estimate

the application of the propositions of law involved, it is necessary to notice the somewhat picturesque history of the settlement of Annette Island by the Metlakahtla Indians. These Indians formerly lived in British Columbia. Under the tutelage of a missionary of the Church of England named William Duncan they advanced unusually far toward civilization. (R. 172, 173.) A difference of opinion developed between Duncan and his ecclesiastical superiors and the result was the migration of the tribe from British Columbia and their settlement on Annette Island.[1] As appears from the chart (Defendants' Exhibit 1, R. 178), Annette Island, just off whose shores lie a few very small islands which together make a group, is within the territory ceded to the United States by the Emperor of All the Russias, by Article I of the treaty promulgated as ratified, June 20, 1867. It should be remembered that by Article VI of that treaty (15 Stat. 539) it was provided:

> The cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion and appurtenances thereto.

The progress of the Metlakahtlans continued after their settlement in our territory. (R. 38.) A village has been established with a school, a water system, fire protection, a sawmill, a fish

[1] This migration was after consultation with the President and the Secretary of the Interior. Report, Bureau of Education for Alaska, 1914, p. 59.

cannery, and a church claimed to be one of the largest in Alaska. (R. 38, 233.) The Metlakahtlans enjoy a considerable measure of self-government. All of this has come about under the guidance of Mr. Duncan, who continued to be the spiritual and temporal leader of the community until within a few years when, having reached a very advanced age, a regrettable controversy with the officers of this Government resulted in his usefulness to his adopted people becoming seriously diminished. This progress has come about also as a result of the attitude of protection and help of the Government of the United States as displayed both by the action of the executive departments and by that of the Congress.

Congress took the first action. In 1891 it took cognizance of the settlement on Annette Island and enacted section 15 of the act of March 3, 1891 (26 Stat. 1095, 1101). By that section it was provided:

> SEC. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago, in southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians and those people known as Metlakahtlans who recently emigrated from British Columbia to Alaska and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regula-

tions and subject to such restrictions as may be prescribed from time to time by the Secretary of the Interior.

Since that time, and until 1916, the Metlakahtlans have enjoyed undisturbed possession of the islands named and of the adjacent waters.[1] (Op. Dist. Judge, R. 42, 43.)

Annette Island is substantially without arable lands. Had the Metlakahtlans been a pastoral people, it would have been wholly unsuitable for their occupancy and the action of Congress idle. But the Metlakahtlans, "as everybody knew" (Op. Dist. Judge, R. 39), were not an agricultural or pastoral people. They were hunters and fisherfolk. In the supply of fish in the waters around the island lay a primary means of subsistence and the support of the very considerable prosperity of the settlement. "Without the food yield of the sea these Indians could not survive." (Op. Dist. Judge, R. 39.) Should these fishing grounds be exhausted or access to them by the Metlakahtlans be seriously interfered with, not only will a promising opportunity for commercial development, by the establishment of a fish cannery and the training of the Indians in its conduct, be destroyed, but an obvious and serious

[1] These waters are not in the open sea. Annette Island is an interior—and very small island—in the Alexander Archipelago. It is surrounded by the connecting waterways. Of these, Clarence Strait—the widest—is about 15 miles wide. The others are much narrower.

menace to the continued life of the colony and to the carrying out of the benevolent purpose of Congress will arise.

It should be noted that Congress had in mind not only the welfare of the Metlakahtlans themselves but of other natives of Alaska who might be persuaded to join the colony thus established and profit by the example and cooperation of this unusually advanced people. To that end it expressly extended the benefits of the reservation created by the act of 1891 to " such other Alaskan natives as may join them."

Further evidence of the interest of the Congress in this settlement is found in the specific exception of the Annette Islands from the operation of the act of May 14, 1898 (30 Stat. 409, 413), relating to entry upon and purchase of public lands in Alaska. The exemption was specifically continued in the Act of July 8, 1916 (39 Stat. 352), relating to the same subject. Even more significant as bearing upon the general purpose of Congress with respect to the Metlakahtlans and as indicating its realization of their essential dependence upon the sea was the passage of the act of March 4, 1907 (34 Stat. 1411), by which the privilege of becoming masters and pilots of vessels was conferred upon the Metlakahtlans and vessels owned by them were given the status of vessels of the United States, " with the same force and effect as if they (the Metlakahtlans) had been citizens of the United States."

Since 1891, however, a radical change in the methods of commercial fishing in Alaskan waters has come about. The use of nets and seines has been superceded by the use of more or less permanent erections of piles and webbing called fish traps. They cover a considerable area (R. 88; Defendant's Exhibit No. 2) and are sufficiently strongly built to resist any storm (R. 113). They require some replacement of piles and webbing annually (R. 100, 101), but a satisfactory location is continuously occupied. The appellant intended such continuous occupation of the trap site in question in this case (R. 128). These traps, which are placed in the course of the fish as they seek the spawning grounds, are so effective for their purpose that unless thoroughly regulated and supervised they will eventually completely exhaust the supply of fish. (Op. Dist. Ct. R. 44.) How effective they are is shown by the expectation of officers of the appellant that in a single year 600,000 salmon would be taken by the one trap whose location is now in question. (R. 119.) Moreover profitable locations for such traps near the main land are becoming fewer and an increasing tendency on the part of the salmon packers to seek locations near the open sea had during the past few years become manifest. (R. 133, 140.) The waters around Annette Island afford favorable locations for such traps.

In the light of these circumstances and of this history, the President on April 28, 1916, made a proclamation, in which, after reciting the terms of

the act of March 3, 1891, reserving, as above stated, the Annette Islands for the use of the Metlakahtlans, he said:

> Whereas the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and
>
> Whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery;
>
> Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

> Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

While the exact extent of their knowledge is in dispute, it is plain that both the president and the superintendent of the appellant corporation had, as early as March, 1916, some knowledge of the fact that the Government was intending some action with respect to the matter and was contemplating arrangements with one Harris for the operation under his direction of the cannery referred to in the proclamation just quoted. (R. 118, 119.)

Nevertheless, on April 7, 1916, the appellant began to drive piles for the erection of the trap which is the subject of this case. It completed putting in the piling by April 18. The webbing necessary to the operation of the trap was not placed until after the making of the Executive proclamation. This trap was erected within 3,000 feet of low-water mark on Annette Island in deep and navigable though perhaps unfrequented and dangerous waters. Reference to the exhibits shows that the location is just south of the entrance to the roadstead off the village of Metlakahtla.

On May 2, 1916, appellant was notified of the proclamation and warned not to trespass further upon the reserved waters. Upon a refusal to vacate this suit was brought.

A few minor facts may be noted. So far as the record shows, no white man had ever been permitted to fish in any manner or to drive any trap in the waters surrounding Annette Island (R. 58). Permits to drive such traps had been granted in 1915 to natives under regulations of the Secretary of the Interior (R. 58). These permits were issued by the mayor of the island. The maintenance of a fish trap is to-day necessary to the operation of a commercially successful cannery by or for the Metlakahtlans. (R. 109, 110, 132.) Seventy-five per cent of the fish canned in Alaska are so caught. (R. 100). In the opinion of officers of appellant the location in question is one of the best in Alaska for a fish trap. (R. 140.) A fish trap lasts only a year without considerable rebuilding, but the appellant intended to renew this trap (R. 128) and to operate another (R. 151).

Section 10 of the rivers and harbors act of March 3, 1899, also is important. It provides in part—

> That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States outside established harbor lines or where no harbor

lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War.

## II.

### The Contentions of the Parties.

The contentions of the appellant are set out on pages 23 and 24 of its brief in this Court. Shortly stated they are as follows:

1. That the act of March 3, 1891, affected only the uplands of Annette Island. That Congress neither attempted to put nor put any limitations upon the exercise of an asserted public right of fishing in the surrounding waters.

2. That it was beyond the power of Congress to interfere with the free exercise of this right by excluding from fishing in those waters persons other than those for whom the reservation of Annette Island was made.

3. That, a *fortiori*, the President could not do so by proclamation.

4. That had the power existed, generally speaking, the appellant has here acquired a vested right of which it can not be deprived without compensation.

5. That this case is not affected by the rivers and Harbors Act of 1899.

These contentions are severally denied by the Government. It says:

1. That it was clearly within the power of the Government of the United States not only to re-

serve for the use of the Metlakahtlans and of such other Alaskan natives as might join them the upland of Annette Island (which appears to be conceded), but also and to the extent necessary to effectuate its purpose, to reserve the surrounding waters.

2. That, fairly construed in the light of the attendant circumstances, the Act of 1891 makes such a reservation.

3. That the proclamation of the President was a proper administrative act of definition of the extent of this reservation.

4. That apart from this, the proclamation, not being inconsistent with the act but designed to carry out its purpose, was of itself within the power of the President and *ex proprio vigore* brought about effectively the reservation of the waters in question and the exclusion of the appellant and of all others except those for whom the reservation was made.

5. That the appellant had and could acquire no rights, vested or otherwise, which it could effectively assert against the United States in defense of this suit.

6. That, in any event, under the Rivers and Harbors Act of 1899, the structure erected by appellant was illegal and on that ground the United States is entitled to the relief which was granted.

## III.

### The Issues.

These questions, then, are submitted to the court:

1. Did the power exist in the Government of the United States to reserve for the exclusive use of the Metlakahtla Indians and of such other Alaska natives as might join them in residence upon the Annette Islands, the waters off said islands to a distance of 3,000 feet from low-water mark?

2. If such a power existed, has it been effectively exercised either by the act of Congress or by the President's proclamation or by both?

3. If so, has anything happened which gives this appellant the right to assert that as against it the attempted exercise of power was ineffective?

4. Is the United States otherwise entitled to the injunction granted it below?

ARGUMENT.

## I.

**The power to exclude from the waters in question all persons except the Metlakahtla Indians and such Alaskan natives as should join them in residence was in the Government of the United States.**

### A. THE POWER OF THE GOVERNMENT TO RESERVE PORTIONS OF THE PUBLIC DOMAIN FOR THE EXCLUSIVE USE OF INDIAN TRIBES IS UNDOUBTED.

#### 1. Parts of the public domain can be set aside to be used for public purposes.

This proposition does not require extended argument. The Nation is the owner of the public domain. The Government has the rights of an ordinary proprietor to maintain its possession, to prosecute trespassers, to prohibit the use of its lands, to sell or withhold them from sale. The public lands are held in trust for the people of the whole country. It is not for the courts, but for Congress, to determine how that trust shall be administered. All these propositions are settled. They flow from the grant in Article IV, section 3, of the Constitution, and have been recently enunciated by this court. (*Light* v. *United States*, 220 U. S. 523, 536, 537; *Kansas* v. *Colorado*, 206 U. S. 89; *Stearns* v. *Minnesota*, 179 U. S. 243; *Butte City Water Co.* v. *Baker*, 196 U. S. 126; *Camfield* v. *United States*, 167 U. S. 524.)

As long ago as 1867 this Court, in *Grisar* v. *McDowell* (6 Wall. 363, 381), said:

> From an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

**2. A reservation for these Indians is for a public purpose.**

The provision of a reservation for the abiding place and exclusive use of Indian tribes has been the settled policy of this Government for many years. That such is a public purpose has been recognized by repeated acts of legislation and by many decisions of this Court which at so late a day it is not necessary to notice in detail. A single concise statement of the matter may, however, be quoted. In *United States* v. *Rickert* (188 U. S. 432) the court said, speaking of the occupancy by the Indians of land so reserved:

> They occupy these lands with the consent and authority of the United States and the holding of them * * * is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life and, ultimately, the privileges of citizenship * * *. [They are] an instrumentality employed by the United States for the benefit and control of this dependent race and to

> accomplish beneficent objects with reference to a race of which this court has said that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection and with it the power."

Such reservations have been repeatedly made of lands within the boundaries of a State. (See 17 Op. Atty. Gen. 258, 260; *Donnelly* v. *United States*, 228 U. S. 243.) Here, however, the locus is within a territory.

It is not important that, as appellant suggests, the Metlakahtla Indians had not long been resident within the territory of the United States when the act of 1891 creating the reservation was passed. In the first place it was not for their benefit alone but also for that of any other Alaskan natives who might join them in residence. In the second, the Metlakahtlans were then commorant within the United States. Not having chosen to expel them, its relation toward them became exactly that which it held toward those tribes which, having been longer resident in territory now its territory, had formerly been recognized by the Government and the courts as having some, though not all, the attributes of sovereignty. Like the Cherokees or the Sioux, while neither state nor nation, they were a separate people, a local dependent community. Like them they became the wards of the

Nation. (*Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U. S. 375.) For over thirty years they have been so recognized and treated by the Congress and the executive department of the Government.

B. THE LOCUS IN QUESTION IS A PART OF THE PUBLIC DOMAIN WITHIN THIS RULE.

**1. The United States has a title in the locus which it can grant even to individuals.**

Apart from the peculiar nature of the title held by the United States to the particular locus as a part of the grant made by the Emperor of All the Russias—a circumstance which will be noticed later—these waters under general and familiar principles are as definitely a part of the public domain as any of the public lands. The United States has in them a title which it can grant to individuals, free of all servitudes and incumbrances.

Under international law the waters are, of course, territorial waters of the United States. And not only dominion over them but the rights of ownership are vested in this Government. The law upon the point was clarified and settled by the decision of this Court in *Shively* v. *Bowlby* 152 U. S. 1. Previous to that decision, while it had been recognized that title was in the United States, it had been supposed, as a result of certain

*dicta* in earlier decisions, that the title was subject to such limitations looking toward the preservation of the sovereign rights in such waters for the people of the future States which might be organized in the territory in question that the United States could not grant the tide lands to individuals. In the *Shively* case, *ubi supra,* this misapprehension was removed. After a careful review of the authorities, this court said (48):

> We can not doubt therefore that Congress has the power to make grants of land below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, *or to carry out other public purposes appropriate to the objects for which the United States holds the territory.* (Italics ours.)

Undoubtedly, as the court recognized in the Shively case, this is a power the United States has exercised sparingly and with caution for obvious reasons of public policy. No such grants have been made by general laws and in general, as the Court observes (49) the United States has recognized that these lands were chiefly valuable for public purposes of commerce, navigation, and fishery and should not be granted away to individuals

piecemeal as private property, but should be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State after it shall have become a completely organized community. (See also *Mann* v. *Tacoma Land Co.*, 153 U. S. 273.) If, however, it be said that this is a holding in trust, it is a trust like that under which all the public lands of the Nation are held for the people of the whole country. (*United States* v. *Trinidad Coal Co.*, 137 U. S. 160.) "It is not for the courts to say how that trust shall be administered." (*Light* v. *United States*, 220 U. S. 523, 537.) So far as the policy in question interposes any check upon the free disposition of these tide lands it is a check upon the conscience and guide to the intelligence of Congress and is not a limitation upon its power. Where the grant is reasonably in aid of a public purpose, the power of the United States to make the grant is absolute. These waters are beyond question a part of the public domain and as such are within the disposal of the Government of the United States.

**2. A fortiori, the United States can reserve the locus for the maintenance and exclusive use of these Indians.**

If the United States can make an absolute grant of the bed of these waters to an individual, it seems to go without saying that it can reserve them "until otherwise provided by law" for the established public purpose of providing for the

support and development of a very considerable body of " wards of the Nation " toward whom it owes the duties and with respect to whose protection it has the power which already has been sufficiently discussed. (*Supra*, 15–17.)

**3. No rights of appellant, as a member of the general public, limit the power of the Government to reserve these waters.**

It remains only to inquire whether as asserted by appellant there exists in it as a member of the public a right, in the nature of a servitude, to use the waters in question for purposes of fishing which imposes an effective limitation upon the power of the Government to reserve them so far as fishing is concerned for the exclusive use of the natives domiciled upon Annette Islands.

A. THIS IS SETTLED BY SHIVELY V. BOWLBY, 152 U. S. 1.

The short answer to such a contention is to point out that the existence of any such right is inconsistent with the absolute power of disposition by grant shown by the *Shively* and *Mann* cases to be in the United States. This is the answer given by the Circuit Court of Appeals in this case. (R. 244; 240 Fed. 274, 282, 283.) And as bearing upon the public purpose involved in the reservation it adds:

> It may be objected further that the law as stated by the Supreme Court is not authority for the reservation of the waters adjacent to Annette Island for the reason that the reservation is for the benefit of

the Metlakahtla Indians and not for the whole people. We think that such a reservation is for the benefit of the whole people. It protects the food supply of a whole tribe of Indians and other native Indians that may join them and provides the means for their self-support. In guarding against the possibility of these Indians becoming a public charge, the measure is clearly a public concern for the benefit of the whole people.

B. THAT NO SUCH RIGHTS EXIST IS MANIFEST ON PRINCIPLE.

Apart from the authority of the *Shively* case, appellant's proposition that the general power of reservation can not be exercised as to these waters because its exercise would cut off appellant and others from the exercise on their part of a common right of fishery existing at common law is however untenable.

The appellant here seeks to justify the construction upon soil belonging to the United States of an erection of considerable size and permanent character. This erection is for its exclusive use. No one else can fish where it erects its trap. It says it has the exclusive right to fish at that spot because the United States, though owning the spot, can not exclude it therefrom. And that the United States can not exclude it therefrom because to do so would be to give exclusive rights of fishing at that spot to others than the appellant. And,

finally, that the United States can not give an exclusive right to fish at a given spot to anybody. To attempt to justify a claim of an exclusive right to fish at a given spot by the negation of the right of the owner of that spot, who is at the same time the sovereign, to grant such an exclusive right to anybody is a proposition so extraordinary as to demand cautious inquiry.

I. A GENERAL RIGHT OF FISHERY AT COMMON LAW, IF EXISTING, IS INAPPLICABLE TO THESE WATERS.

Since a general right of fishery at common law is asserted as the basis upon which this superstructure is erected, this inquiry may begin with the question whether in view of the nature of the title by which the United States holds this particular *locus* any general right at common law has significance.

The islands in question and the adjacent waters became the property of the United States by cession under the treaty of 1867 (15 Stat. 539), from "His Majesty, the Emperor of all the Russias." By Article VI of that treaty it was provided that the territory and dominion ceded was free and unencumbered by any reservations, privileges, franchises, grants, or possession of any associations or corporations or of any persons other than individual property holders. No such appear from the record here to have had any rights whatever in Annette Island or the surrounding waters.

In the article quoted it was specifically provided that—

> The cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory and dominion and appurtenances thereto.

When these rights are examined it appears that by the Russian Civil Code (Book II, Title I, Chapter II, articles 248, 251), lands under the sea ("rivages maritimes"), lakes, navigable rivers, and islands were a part of the domain of the State.[1] And while the private right of property recognized by the code was only to enjoy and to dispose of "within the limits laid down by law" (Book II, Title II, Chapter I, article 264), the property of the State was subject to "sovereign disposition," "disposition souveraine" (Book II, Title II, Chapter I, article 263).

There was known to the Russian law a servitude over *private* property with respect to fishing, but it fell far short of the right here claimed by a great corporation to fish to exhaustion for commercial purposes the waters in question. It was limited to the catching of such fish as might be needed for personal use. It is of some interest that the Czar in granting lands in fief could, and sometimes did, deal separately with this restricted

[1] "Code Civil de l'Empire de Russie. Traduit sur les Editions officielles par un Jurisconsulte Russe" (with a prefatory essay by Victor Foucher, Avocat-General du Roi), Paris, 1841.

right. (Lehr: Elements de Droit Civil Russe, 1877, p. 308.)

The rights of the United States in the public domain are those of an owner of property. *Light* v. *United States,* 220 U. S. 523, 536. In Alaska its rights do not come by devolution from the English crown as did the rights of the thirteen colonies in their navigable waters. As to these waters and their bed, the United States succeeded to the rights of the Czar (*Strother* v. *Lucas,* 12 Pet. 410,) who held them subject to his "sovereign disposition." Whatever may have been the limitations imposed by the common law upon the *jus regium* of the Kings of England, those limitations are here inapplicable.

It follows that the elaborate argument based by appellant upon the analysis of the rights of the King of England over navigable waters, made by the court in *Arnold* v. *Mundy* 6. N. J. Law, 1 is, if conceded to be sound, here beside the point.

II. THERE IS, HOWEVER, NO SUCH GENERAL RIGHT OF FISHERY AS THE APPELLANT ASSERTS, EFFECTIVE AGAINST A RESERVATION OF THE WATERS, FOR A PUBLIC PURPOSE, BY THE UNITED STATES.

It is not necessary for the purposes of this case to enter into an elaborate inquiry into the precise nature and extent of the right of fishing in public waters which is referred to in various decisions cited by appellant as a public right. The question here is whether any right exists

which is superior to the power of the Government to reserve a part of the public domain for a demonstrated public purpose. What would be the right of the appellant in these waters had the present reservation not been made is not here material.

Perhaps the simplest way of determining the question whether there exists any public right of fishing which renders ineffective the attempt of the Government to reserve the use of these waters for the benefit of the natives in question is to examine briefly the cases upon which appellant principally relies to support its proposition.

At the outset of this examination the word of caution uttered by this court in concluding its review of the existing authority in *Shively* v. *Bowlby* (152 U. S. 1) should be noticed. It is said (26):

> The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject, but that each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. ***Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.*** (Italics ours.)

It also is to be remembered where these questions arise in a case which involves the rights of a State, they are questions of the local law of that State, with regard to which the decisions of its courts are conclusive. (*Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371; *Illinois Central Railroad* v. *Chicago*, 176 U. S. 646, 659.) But such decisions, where *contra* to the principles laid down in the *Shively* case which settled the law as to the rights of the United States over tidewaters in the territories, are not authorities upon the present question. Nor do they gain any support from the *dicta* found in opinions of this court preceding *Shively* v. *Bowlby*, and alluded to with disapproval in that decision (p. 47).

It may be said, however, that it is established law in substantially every State of the Atlantic and Gulf seaboard that the sovereign may grant exclusive rights of fishery despite the alleged general right of the public. In the margin[1] are

[1] Maine, chap. 45, secs. 17, 18, Rev. Stat. 1916; New Hampshire, Pub. St., ch. 133, secs. 20, 21; Massachusetts, Rev. Laws 1901, ch. 91, secs. 100, 101, 104, 105; Rhode Island, Gen. Laws 1909, Title XX, ch. 203; Connecticut, R. S. 1902, secs. 3214, 3215; New York, Laws 1912, ch. 318, secs. 300, 304; New Jersey, R. S. 1911, vol. 2, secs. 38, 59, 63, 80, 163; Delaware, Rev. Code 1915, secs. 2421, 2422, 2423, 2430, 2431, 2464; Maryland, Bagby's Ann. Code 1911, Art. LXXII, secs. 1, 20; Virginia, Ann. Code 1904, secs. 1338, 2130c; North Carolina, Pell's Revisal 1908, secs. 2371, et seq.; South Carolina, Code 1912, secs. 893, 909; Georgia, Park's Ann. Code 1914, sec. 1943; Florida, Compiled Laws 1914, secs. 651a, 651j; Alabama, Policial Code 1907, secs. 1581,

collected references to the statutes of Maine, Massachusetts, New Hampshire, Connecticut, Rhode Island, New York, New Jersey, Maryland, Virginia, Delaware, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas. In view of this showing of actual legislative grants of exclusive rights of fishing it is somewhat surprising to be told that the grant of such an exclusive right is beyond the power of the sovereign. It is true that these grants are in general designed to encourage the development of the fishing and especially of the shell-fish industry. But it is a far cry to say, as appellants suggest in their brief, page 63, that the purpose is to add to the public right of fishing and make it more valuable. The public as a whole may well be benefited by an increase in the food supply and the grant of such exclusive rights may well be a proper means to bring about that public benefit. At any rate these are matters as to which decision rests in the discretion of the legislature. But a general right of taking oysters can hardly be materially advanced by a grant of an exclusive right to plant young oysters at a given spot in the bed of a navigable river and to take them therefrom when they are mature. Oysters remain where they are planted and the increase

1586, 1588; Mississippi, Hemingway's Code 1917, ch. 147, secs. 6133 et seq.; Lousiana, Marr's Ann. R. S. 1915, vol. 3, secs. 5330–5332; Texas, Meachin's Civ. Stat. Ann. 1913, art. 3980. 3986.

in a private bed does not inure to the stocking of unrestricted areas.

The justification of the grant of these rights may well lie in the judgment of the legislature that a public purpose is served thereby. That judgment may well be one which the courts can not properly review. But no higher or more definite public purpose can be suggested for these grants than that already pointed out as served by the reservation here in question.

Turning from these statutes to the decisions one is struck at the outset by the fact that the principle of *Arnold* v. *Mundy* (6 N. J. Law, 1), from which such extensive quotations are made by appellant in its brief (pp. 30, 31, 33, 34, 35, 36, 37) is apparently no longer law even in New Jersey. That case held that the proprietors of New Jersey did not under the grant from the Duke of York take such a property in the soil of the navigable rivers in that State that they could grant several fisheries therein. In deciding *Shively* v. *Bowlby*, however, this court reviewed the latter decisions of the courts of New Jersey, including among others *Stevens* v. *Patterson, etc., R. R.* (5 Vroom, 532), and *Penna. R. R.* v. *New York, etc., R. R.* (23 N. J. Eq., 157), and noticed what was said by this court respecting the New Jersey law in *Hoboken* v. *Penna. R. R.* (124 U. S. 656, 688, 690, 691), and showed that the power of the State to grant to individuals land under tide waters was by the law

of New Jersey absolute. That power necessarily included the lesser power involved in *Arnold* v. *Mundy.*

If accepted, however, as law, *Arnold* v. *Mundy,* is fatal to the appellant's contention here. For in that case it was decided that no one could acquire a vested right of property in oyster beds which he had planted in tidewater. The plaintiff who had planted such a bed was refused relief against a stranger who came and carried away his oysters. Here the appellant claims that by virtue of his common-law right of fishery he can acquire a vested right to maintain a fish trap which can not be taken from him without compensation.

It is not necessary to deal in detail with the cases supporting the right of the States to grant such exclusive rights. One of them decided by this court may, however, be briefly noticed because of its bearing upon appellant's earnest contention that the title of the United States in these waters is not like that under which it holds the public lands and its right of disposition is therefore more limited. In *McCready* v. *Virginia* (94 U. S., 391), decided in 1876, a conviction under a Virginia statute forbidding any person not a citizen of Virginia from catching shell fish or planting oysters in the waters of that State was upheld. This court said (396):

> The planting of oysters in the soil covered by water owned in common by the people of the State is not different in prin-

> ciple from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State in the regulation of its public domain can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered with water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow that it might by appropriate legislation confine the use of the whole to its own people alone.

It may be remarked in passing that the appellant corporation is not a citizen of Alaska or a prospective resident of the possible future State into which Alaska may some day be erected. It is a corporation of Oregon. (R. 25.)

*Lincoln* v. *Davis*, 53 Mich. 375, is cited upon appellant's brief, as is the *McCready* case, just mentioned. In that case the Michigan courts by clear inference recognized the right of the State to grant exclusive fishing privileges as an incident to the working out of its public policy with respect to its navigable waters. There was a statute reserving to riparian owners fishing rights within a mile of shore. In holding that such a statute gave no protection to the riparian owner with regard to waters outside the zone so limited no doubt was expressed as to the validity of the protection within the area prescribed—an area very

considerably more extensive than that here in question. The State was not a party to the case, and its power of control and regulation of the navigable waters beyond the zone fixed by the statute in question was not challenged.

As a matter of fact, the power of the United States to include within an Indian reservation the bed of navigable waters has been the subject of notice by this Court in a very late case. In *Donnelly* v. *United States,* 228 U. S. 243, the question was whether the crime sought to be punished had been committed upon an Indian reservation. The reservation involved had been originally established by an Executive order by President Grant under the authority of a statute which provided no more than that the President should set apart a tract of land within the limits of California of suitable extent for the accommodation of the Indians, to be located as far from white settlements as was practical, "having due regard for their adaptation for the purposes for which they are intended." (13 Stat. 39, c. 48.) The limits of the reservation so established were without further action of Congress extended by order of President Harrison to include "tract of country * * * on each side of the Klamath River." This order was construed for reasons which in part are equally applicable here to include the bed of the river, if the United States was the owner of the river bed. The crime was com-

mitted in the river bed. The attention of the court was called to the navigable quality of the river. The Court, speaking by Mr. Justice Pitney, said (260):

> It is insisted that the Klamath is a navigable river, and there is evidence in the record tending to show that the stream is navigable in fact. * * * But in the view we take of the present case the question of its navigability, in fact or in law, is immaterial except as it bears upon the title of the United States to the bed of the stream. The present question is whether that bed was part of an Indian reservation, and that depends upon the question of ownership.

This recognition that it is within the power of the Government to include (in that case by Executive proclamation) the bed of navigable waters if, as in the case now at bar, the title of the United States is clear is unaffected by the fact that upon a petition for rehearing (228 U. S. 708, 711) the Court recalled so much of its opinion as held that by certain statutes of California the title to the bed of the river, if in fact navigable, had been vested in the United States.

The chief reliance of the appellant, apart from *Arnold* v. *Mundy,* which already has been noticed, is upon *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387. This was a decision by four judges of this Court. It preceded *Shively* v. *Bowlby,* 152 U. S. 1, and the opinion in the later case, which

was unanimous, was written by Mr. Justice Gray, who was one of the three dissenting justices in the earlier case. Certain expressions in the opinion in the *Illinois Central* case must therefore be now read in the light of the positive statement of the power of the United States made in the *Shively* case. The case did not involve the rights of the United States and what was settled by the decision was the law of Illinois. What was attempted by the statute of Illinois was to give to the railroad company " not simply for its own purpose as a railroad corporation but for its own profit generally " (p. 451) the control of practically the entire harbor of Chicago. This statute had been repealed. (P. 463.)

The Court held that such a grant was " necessarily revocable " and that this repealing act was valid. It added (p. 455):

> We can not, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation.

Manifestly a decision upon such facts has little relation to the case now at bar. Here there is no grant, but merely a reservation of the use of waters whose title remains in the United States, and the reservation itself is not only "necessarily revocable" but is expressly so.

The opinion contains certain expressions which were, perhaps, among those *dicta* said in *Shively* v. *Bowlby* to be not strictly true. But the *Illinois Central* case does not deny the right of the State to grant, much less to reserve the use of the land under navigable waters. On the contrary, that right is expressly recognized (pp. 455, 456). And in the dictum of Justice Bradley quoted by the opinion (pp. 456, 457) the power of the State to make an exclusive appropriation of the bed of navigable waters to the use of individuals is clearly stated.[1]

In view of *Shively* v. *Bowlby* and of the general power of the Government over the public domain, its power to make a reservation like that here for a demonstrated public purpose is clearly established.

## II.

**The act of March 3, 1891, contemplated not only the reservation of the uplands of "that body of lands known as Annette Islands" but also of the adjacent waters and, fairly construed, was such a reservation.**

If the power to reserve the waters in question was in the United States and was effectively exercised, it is of little moment whether that exercise

[1] In view of the manner in which this dictum of Mr. Justice Bradley is quoted in appellant's brief it is perhaps not improper to call attention to the fact that it is taken from his opinion as Circuit Justice in *Stockton* v. *Balto., etc., R. R.*, 32 Fed., 9, 19, 20.

was by the Congress or by the Executive or "under their combined powers." (*Tiaco* v. *Forbes,* 228 U. S. 549, 556.)

In this case the District Judge held that the act of 1891 (26 Stat. 1101), fairly construed, was in itself a reservation of the waters adjacent to the islands. The language sets apart "the body of lands known as Annette Islands." This language, says Judge Jennings, is not used in a grant of title, but only in the conferring of a privilege expressly revocable by Congress. It is to continue "until otherwise provided by law." Under all the circumstances it should not be narrowly or technically construed. In view of the invitation extended by the statute to a people who "as everybody knew" were hunters and fishermen (R. 39) and who "largely, if not entirely, depend for their livelihood upon the yield of such vocations," to occupy islands which simply as "land" would not sustain them, the District Judge held that the general language used—i. e., "body of lands," "Annette Islands"—must be held to include the adjacent sea to a reasonable extent (41) since in the sea alone was to be found that which made living practicable upon the adjoining land (41, 42).

It is submitted that this reasoning of the district court is sound. In construing the terms of the executive order upon which *Donnelly* v. *United States,* 228 U. S. 243, turned, and holding that if the United States held the title to the bed of

the Klamath River, it was included within the reservation this Court said (259):

> As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.

The same consideration obviously applies even more forcibly to the present question of construction.

The President's proclamation was in itself a construction of the reservation by Congress as including these waters and their beds and a definition of the extent of that reservation, as was the order in the Donnelly case, just referred to. It had also striking precedent in the proclamation of President Harrison relating to Afognak Island, Alaska, following section 14 of this same act of 1891. That proclamation specifically reserved Afognak Island, "its adjacent bays, rocks, and territorial waters," and all persons were warned not to fish therein.

## III.

**In any event the President's proclamation of April 28, 1916, was an effective exercise of the power of the United States to reserve such adjacent waters.**

The Circuit Court of Appeals did not decide that the District Judge was wrong in his construction of the scope of the reservation as made by the statute. It conceded that point, *arguendo*, however, and put its decision upon the ground of the President's proclamation of April 28, 1916.

As to this no question of construction arises. The language is plain and unmistakable.

The authority of the President to exercise the power of the United States to reserve these waters for the exclusive use of the natives in question is equally clear.

**A. The authority of the President to reserve portions of the public domain for particular public purposes has long been established.**

This Court said in *Grisar* v. *McDowell* (6 Wall. 363, at p. 381):

> From an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress.

See also *Wolcott* v. *Des Moines,* 5 Wall. 681, *United States* v. *Payne,* 8 Fed. 883, 888, *United States* v. *Leathers,* 6 Sawy. 17, 20, 22, *Woolsey* v. *Chapman,* 101 U. S. 769, *Donnelly* v. *United States,* 228 U. S. 243, 256, and cases there cited, 17 Op. A. G. 258.

The last case turned upon an Executive order enlarging a reservation created by a previous Executive order under the authority of a statute phrased in the most general terms. (*Supra,* 31.) As already shown the extension included the bed

of a river, and was none the less effective because the river was navigable. *Inter alia,* the court said, following *Grisar* v. *McDowell* (256):

> From an early period Congress has customarily accorded to the Executive a large discretion about setting apart and reserving portions of the public domain in aid of particular public purposes.

In the pending case the proclamation was, as in the *Donnelly* case, an extension of a reservation created by an earlier act of Congress consistent with its terms and designed to carry out its purpose. It has been decided by this Court, *United States* v. *Midwest Oil Co.,* 236 U. S. 459, that the President *without express statutory authority* might withdraw from purchase lands which had beeen declared *by statute* to be open to such purchase. After referring to the long-established practice of the executive departments, this Court said:

> "Government is a practical affair intended for practical men." And upon the practice of the officers of the Government with respect to such practical affairs this court sustained the power of the President to make the reservattion in question, citing cases.

Reviewing the circumstances attending this case, the Circuit Court of Appeals well say:

> We can think of nothing more practical, under all the circumstances, than the reservation by the President of the waters im-

> mediately surrounding Annette Island for the use and benefit of these Indians; and this was undoubtedly the practical purpose Congress had in view when it made the original reservation.

In view not only of the purposes of the original reservation but of the fact that the Indians' use of the waters in question had for the first time been threatened with invasion for commercial purposes in a manner which threatened not merely the development but the very life of the settlement and the destruction of the plans and hopes of the Government for the protection and advancement of these people, the President's proclamation was clearly a practical necessity.

It may be added that after the President had made the order in the present case, the Congress passed the act of July 8, 1916 (39 Stat. 352), relating further to the extension of the homestead laws to Alaska. As in the preceding act of May 14, 1898 (30 Stat. 409), Annette Island was specifically excepted from its operation.

Considered either as an act of definition of the extent of the congressional reservation and of warning or *ex proprio vigore* as an extension of the reservation made by the statute, it was effective to exclude all persons not among those for whom the reservation was created from the use of the waters in question.

**B. The proclamation was within the authorization of section 465, R. S.**

The present case related to Indian affairs. In *United States* v. *Leathers*, 6 Sawy. 17, the Court said:

> The very extensive powers given to the President by sections 462–465 R. S. in the management of Indian affairs might well be held to include the power to establish a reservation if there were no other acts in relation to this matter.

## IV.

**The appellant had no vested rights effective against the action of the Government.**

So far as the claim of vested rights is based upon the assertion of a share in the public right of fishery nothing need be added to what has been said, *supra*, pp. 16-34.

**A. No such rights resulted from the fact that appellant began the construction of its trap before the proclamation was made.**

Assuming that the trap was not begun and its completion hurried in the light of knowledge that action of the nature of the President's proclamation was about to be taken (R. 118), it was still the fact that the trap was not completed when the proclamation was made and the appellant notified. Had, however, the trap been completed, the fact remained that the appellant had without any variety of permit or license from the Govern-

ment or any of its agencies invaded soil which was the property of the United States and had driven its piles and constructed its erection thereupon.

In the absence of a license to do so, such an erection upon soil under tidewater was an encroachment upon the property of the Government not made in pursuance of the defined rights of a riparian owner—a purpresture which the Government might remove at pleasure whether it tended to obstruct navigation or did not. (*Webber* v. *Harbor Commissioners,* 18 Wall. 57.) The appellant was, as is said by the Circuit Court of Appeals (R. 245, 246), a mere trespasser.

A question not wholly unlike that here presented came before this court in *Russian-American Co.* v. *United States* (199 U. S. 570). In that case the appellant without authority settled on Afognak Island, Alaska, and built a cannery. Its rights, if any, were terminated by President Harrison's proclamation under section 14 of this same Act of March 3, 1891, reserving the island, its bay, and territorial waters for governmental purposes. As pointed out, *supra,* p. 36, that proclamation which warned all persons not to fish in the waters reserved was a striking precedent for that in this case.

Despite the fact that the appellant had erected and occupied without objection for four years extensive and costly buildings and had there carried on a profitable business, which was destroyed by its eviction, it was held to have obtained no rights

to any compensation when compelled to remove from the island. The Court concluded its opinion by saying (579):

> As the President exercised the rights thus reserved and declared the whole island appropriated for the purpose of establishing a fish-culture station, and warned all persons to depart therefrom, it is clear that the rights, if any, previously acquired by the settlement were terminated by the proclamation. Petitioner gained no additional consideration for the improvements put upon the land, since if for no other reason these were made prior to the act of 1891, when it was a mere trespasser and occupying the land without a shadow of title.

**B. There is nothing in the appellant's claim that it has gained some rights by not violating sections 261, 262, of chapter 3 of the Compiled Laws of Alaska.**

It is difficult to understand this contention which is made on page 79 and elsewhere of appellant's brief. The appellant says that "the fish trap in question was constructed under and in compliance with an express act of Congress recognizing and regulating the constructing and maintaining fish traps in the navigable waters of Alaska."

To this the best answer is to call attention to the statute. It is chapter 3, Comp. Laws of Alaska, secs. 261, 262. These sections are printed at length in appellant's brief, pages 82, 83.

The sections provide that certain acts shall be unlawful, namely, to erect certain structures for

fishing in certain places. By section 271 of the same chapter violation of these provisions is made punishable by fine or imprisonment or both. An abstention from violation of penal statutes of this character hardly can be said to confer a vested right to enter upon the soil of the public domain against the will of the sovereign.

## V.

**Apart from any question of the power of Congress to reserve the waters for the exclusive use of the Indians, the United States was entitled to this injunction.**

### A. The appellant was a mere trespasser.

As between the United States and this appellant, the United States was the owner of the *locus*. It was entitled to be free of an invasion thereof by the appellant, who was a mere trespasser. This proposition has already been sufficiently discussed. (*Supra,* 40–41.)

### B. The appellant's trap was erected in violation of the Rivers and Harbors Act of 1899.

The trap was built in deep and navigable water of the United States, just south of the entrance to the roadstead of Metlakahtla. It is not contended that any harbor limits have been there established. No permission was sought of the Secretary of War. No matter how little navigation actually seeks to use these waters at present

or how dangerous such use would be because of natural obstructions to navigation which have not yet been removed, the appellant's trap was an obstruction to the navigable capacity of the water in question. It was squarely within the prohibition of the statute.

### CONCLUSION.

The reports of the Bureau of Education for the natives in Alaska (1913, pp. 59–62; 1916, pp. 5, 6; 1917, pp. 6, 7) not only review the history of the Metlakahtlans and their settlement but the continuous efforts of the Government in their behalf. The appellant in its brief goes somewhat out of its way to criticize the action of the President. While not so pointed in its reflections as in its brief below, it still talks of a scheme to confer monopolistic rights upon one Harris and describes the reference to the Metlakahtlans "as mere camouflage" (p. 115). These and similar suggestions need not be noticed further. But since the appellant goes outside the record to make certain assertions and to suggest certain gloomy results as possible from the action of the Government (pp. 117, 138, 102, 103), attention may be called to the present situation as set out in the Bureau of Education's report for 1917 (pp. 6, 7, 33), and to the terms of the lease referred to by appellant in its brief at the place quoted (p. 115). The Bureau says:

> Action was again taken to put in operation the industries in Metlakahtla, on Annette

> Island. . . The lessees guarantee the payment during the season of 1917 of not less than $4,000 for fish-trap privileges. The cannery is to be operated for five seasons beginning with 1918. For the cannery and fish-trap privileges during these five years the lessees guarantee the payment of not less than $6,000 per annum. Except in a few instances where skilled labor is required, only native inhabitants of Annette Island are to be employed. It is hoped that the annual income to the Metlakahtlans from the leases will enable them at the end of the period of the lease to purchase all of the lessee's interests and operate the cannery themselves, under the supervision of the Federal Government. A local cooperative company has rehabilitated the sawmill, which is now furnishing lumber for the cannery building as well as for other buildings in the village. Six thousand dollars of the bureau's funds were expended in installing a water system to furnish drinking water for the village, and limited water power for the cannery and sawmill.

The practical question in this case is whether this opportunity for development and prosperity shall be closed to these wards of the nation by the preemption of the fishing possibilities by a great corporation. Obviously it should not.

The major legal question is whether the Government has the power for this public purpose to reserve so much of the public domain as is compre-

hended within the proclamation and whether it has effectively exercised that power. To these questions the two lower courts have both answered that the power exists and has been exercised. And their answer was right. The appeal should be dismissed.

LaRue Brown,
*Assistant Attorney General.*

## ALASKA PACIFIC FISHERIES *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 212. Argued November 4, 1918.—Decided December 9, 1918.

For safeguarding and advancing a dependent Indian people, resident on islands belonging to the United States in the Territory of Alaska, Congress has power to reserve for their use, until otherwise provided by law, not only the upland of the islands but also the ad-

jacent submerged land and deep waters supplying fisheries essential to the Indians' welfare. P. 87.

An act of Congress set aside, "until otherwise provided by law the body of lands known as Annette Islands," in Alaska, for the use of the Metlakahtla Indians (recently emigrated from British Columbia and settled on the islands with the encouragement of executive and administrative officers,) and such other Alaskan natives as might join them, to be held and used by them in common, under regulations of the Secretary of the Interior. The islands were a well-defined group, uninhabited before the coming of the Indians, who were peculiarly dependent on the adjacent fisheries. *Held*, in view of the circumstances at time of the enactment and its subsequent construction, that the reservation included adjacent deep waters; and that a fish net constructed therein by defendant 600 feet beyond high tide line, and whose operation might materially reduce the supply of fish accessible to the Indians, was subject to abatement at the suit of the United States. P. 89.

240 Fed. Rep. 274, affirmed.

THE case is stated in the opinion.

*Mr. John A. Hellenthal* in a brief for appellant:.

The act is explicit, reserving only the "body of lands known as Annette Islands." The water surrounding an island forms no part of it. Grants of land on navigable water go only to ordinary high tide.

Public navigable waters are not part of the public domain. In a Territory, the United States holds them, not as land-owner, but as sovereign, in trust for all the people, who have common rights therein of fishery and navigation. And this right of fishery is a property right. *McCready* v. *Virginia*, 94 U. S. 391; *Rossmiller* v. *State*, 114 Wisconsin, 169. The Government as in the case of a State may regulate the use for the benefit of all, but neither can create a private fishing reserve for the benefit of a few to the exclusion of all others. *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387; *Arnold* v. *Mundy*, 6 N. J. L. 1; *Illinois Central R. R. Co.* v. *Chicago*, 176 U. S. 646; *Martin* v. *Waddell*, 16 Pet. 345; *Pewaukee* v. *Savoy*, 103 Wis-

consin, 271; *Rossmiller* v. *State*, *supra*. These authorities show that a State cannot substantially impair the public rights of fishery and navigation, but is bound to preserve the public waters so that the people may be able to exercise these rights forever. These rights are no different and are no less binding on the Government when, the waters being in a Territory, title is held in trust for a future State. *Shively* v. *Bowlby*, 152 U. S. 1. The authority of the sovereign to make grants below high-water mark depends in each case upon whether the value of the public right will be enhanced or destroyed. *Manchester* v. *Massachusetts*, 139 U. S. 240. This is recognized in *Illinois Central R. R. Co.* v. *Illinois*, *supra*, as applied to a State. It applies also to the United States, in Alaska, where the Constitution is in full force. *Rasmussen* v. *United States*, 197 U. S. 516. See *United States* v. *Mackey*, 214 Fed. Rep. 146; *Shively* v. *Bowlby*, *supra*; *Illinois Steel Co.* v. *Bilot*, 109 Wisconsin, 418.

Grants of limited exclusive privileges, as for those who produce new supplies of fish or oysters, are upheld as benefiting the public right. *Commonwealth* v. *Weatherhead*, 110 Massachusetts, 175; *Rowe* v. *Smith*, 48 Connecticut, 444; *Commonwealth* v. *Vincent*, 108 Massachusetts, 441.

The effect of the proclamation is to create an exclusive fishery for the benefit of the Metlakahtlans. This is quite different from a withdrawal from entry of public land. *United States* v. *Midwest Oil Co.*, 236 U. S. 459. The Constitution nowhere confers upon the President any special power respecting navigable waters or fisheries; and the common law, in the light of which the Constitution must be considered, recognized no such right in the King. The fisheries in the navigable waters belong to the people at large. The Government has no interest therein which it can reserve for the use of any individual or class. The President cannot include such waters in an Indian reservation. *United States* v. *Ashton*, 170 Fed. Rep. 509.

The proclamation is contrary to § 254, Alaska Compiled Laws, prohibiting aliens from fishing in Alaskan waters. The Metlakahtlans are not natives of Alaska.

The fish-trap was not a purpresture. It was sanctioned by §§ 261, 262, c. 3, Alaska Compiled Laws, and in the exercise of appellant's right of fishing. *Lincoln* v. *Davis*, 53 Michigan, 375. It was vested property. *McCready* v. *Virginia*, *supra;* Farnham on Waters, § 394; *Lewis* v. *Portland*, 25 Oregon, 133; *Pitkin* v. *Olmstead*, 1 Root (Conn.), 217; *Lay* v. *King*, 5 Day (Conn.), 72; *Gallup* v. *Tracy*, 25 Connecticut, 10; *Post* v. *Kreischer*, 32 Hun (N. Y.), 49; *Glover* v. *Powell*, 10 N. J. Eq. 211.

The trap did not obstruct navigation, and authority under the Rivers and Harbors Act was not required.

*Mr. C. H. Hanford* argued the case for appellant:

The injunction strikes a legitimate business. The proclamation creates a private monopoly out of what by right is common to all. It is contrary to public policy. The act is not ambiguous and to strain its construction would not be permissible in the interest of the Indians who are neither wards of the Nation nor in need of charity. Government surveys of land stop at the water's edge. *Barney* v. *Keokuk*, 94 U. S. 324–328; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273–286. Hence, a grant or reservation of a body of land described as an island is a tract having a water boundary; all within the line of separation between the solid and liquid elements constitutes the granted or reserved tract. *Shively* v. *Bowlby*, 152 U. S. 1. The only absolute right appurtenant to land bounded by navigable water is the right of access. An exclusive right was not necessary, in the case of these Indians, to the beneficial pursuit of their calling as fishermen. An exclusive right of fishery offshore is different from a right appertaining to land, so different in essence, so extraordinary, and so unnecessary to the beneficial use

of land, that it does not come within the category of rights appurtenant to the title to real estate. *Baron* v. *Alexander*, 206 Fed. Rep. 272; *Parker* v. *People*, 111 Illinois, 588. *Cf. Kennedy* v. *Becker*, 241 U. S. 556. *Russian-American Co.* v. *United States*, 199 U. S. 579, distinguished.

The act is special, to be strictly construed. *Expressum facit cessare tacitum.*

The President is unauthorized to appropriate any part of the public domain for alien Indians. 18 Opin. Atty. Gen. 557.

Congress alone has power to make rules and regulations respecting Alaska, and its governmental power is to be exercised with a view to the erection of new States to enter the Union on an equal footing with the original States. Congress has declared the status of Alaska to be territory eligible to become one or more States of the Union which will have governmental and proprietary rights with respect to its waters. Act of May 14, 1898, 30 Stat. 409; Alaska Compiled Laws, 1913, § 92.

The proclamation is the first and only public assertion of exclusive rights of fishery in the public waters of Alaska. It was not issued until after the appellant located and constructed its fish-trap, involving a large investment, with due observance of the fishing laws. Since Magna Charta control and regulation of fishing rights has been by the common law of England a legislative function, Crown grants of exclusive rights being expressly forbidden; and in the jurisprudence of this country based upon the common law, the right of fishery in public waters belongs to all the people, controlled and regulated within the States by statutes enacted by their respective legislatures. Gould on Waters, 3d ed., §§ 1, 2, 30, 32, 34, 36, 39, 189; *McCready* v. *Virginia*, 94 U. S. 391; *Manchester* v. *Massachusetts*, 139 U. S. 259, 260; *United States* v. *Shauver*, 214 Fed. Rep. 157; *United States* v. *McCullagh*, 221 Fed.

Rep. 292. This means that in a Territory the subject can only be regulated by acts of Congress.

The Government is not the real party in interest, but appears as a volunteer for the benefit of others to whom it is not legally or morally obligated. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 286.

The fish-trap is a lawful structure on a lawful site.

The Rivers and Harbors Act affords no justification for an injunction in this case.

*Mr. Assistant Attorney General Brown* for the United States:

The power of the Government to reserve parts of the public domain for the exclusive use of Indian tribes is undoubted. This reservation was not for the Metlakahtlans alone, and they, besides, had acquired the same status as other Indian peoples longer resident within the bounds of our country.

The locus in question is part of the public domain within this rule. The United States has a title in these waters which it could even grant outright to individuals. *Shively* v. *Bowlby*, 152 U. S. 1. Undoubtedly, the United States has exercised sparingly its power to make such grants—they are not made under general laws—and has recognized that such lands, chiefly valuable for the public purposes of commerce, navigation and fishery, should be held as a whole, to be ultimately dealt with by the future State. See *Mann* v. *Tacoma Land Co.*, 153 U. S. 273. If, however, it be said that this is a holding in trust, it is a trust like that under which all the public lands of the Nation are held for the people of the whole country. *United States* v. *Trinidad Coal Co.*, 137 U. S. 160. "It is not for the courts to say how that trust shall be administered." *Light* v. *United States*, 220 U. S. 523, 537. So far as the policy interposes any check upon the free dis-

position of these tide lands it is a check upon the conscience and guide to the intelligence of Congress and is not a limitation upon its power. Where the grant is reasonably in aid of a public purpose, the power of the United States to make the grant is absolute.

The power to make the reservation is superior to any right of fishery the appellant may claim, and most especially the right to maintain a permanent fish-trap, affixed to the soil and necessarily excluding all others.

A general right of fishery at common law, if existing, is inapplicable to these waters, which were derived by the United States from the Emperor of all the Russias, with all the rights, franchises and privileges belonging to Russia when the cession was made. Treaty of 1867, 15 Stat. 539. Under the law of Russia, such property was at the sovereign's disposal. Russian Civil Code, bk. II, tit. I, c. II, arts. 248, 251; *ib.* tit. II, c. I, arts. 263, 264; Code Civil de l'Empire de Russie. Traduit sur les editions officielles par un Jurisconsulte Russe (with a prefatory essay by Victor Foucher, Advocat-General du Roi), Paris, 1841. The United States succeeded to the rights of the Czar. *Strother* v. *Lucas*, 12 Pet. 410.

There is, however, no such general right of fishery as the appellant asserts, effective against a reservation of the waters, for a public purpose, by the United States. The rights of a State in tide-lands depend in each case on the local law. *Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371; *Illinois Central R. R. Co.* v. *Chicago*, 176 U. S. 646, 659. The state laws differ widely, and state decisions must therefore be applied with caution. *Shively* v. *Bowlby*, *supra*, p. 26. But it is established law in substantially every State of the Atlantic and Gulf seaboard that the sovereign may grant rights of fishery despite the alleged general right of the public [citing numerous state grants]. It is true these legislative grants are in general designed to encourage development of the fishing, espe-

cially the shell-fish, industry thus benefiting the public; but they are exclusive, and they do not, as appellant contends, add value to the public right of fishing. Such grants can serve no higher public purpose than does this Indian reservation.

*Arnold* v. *Mundy*, 6 N. J. L. 1, seems to have been overruled, *Shively* v. *Bowlby*, *supra*; *Stevens* v. *Patterson &c. R. R. Co.*, 5 Vroom, 532; *Pennsylvania R. R. Co.* v. *New York &c. R. R. Co.*, 23 N. J. Eq. 157; *Hoboken* v. *Pennsylvania R. R. Co.*, 124 U. S. 656, 688, 690, 691; and if accepted as law is fatal to appellant's claim of a vested right in an exclusive location. *McCready* v. *Virginia*, 94 U. S. 391, upholds the state power, as does also *Lincoln* v. *Davis*, 53 Michigan, 375. See *Donnelly* v. *United States*, 228 U. S. 243; *s. c.* 228 U. S. 708, 711. *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, decided a question of Illinois law on peculiar facts, and did not involve rights of the United States. A grant to a railroad for its own profit generally of the control of practically the entire harbor of Chicago was held revocable. Here there is but a reservation, expressly revocable, for a public purpose. The *Illinois Case* contains dicta, doubtless among those referred to disapprovingly in *Shively* v. *Bowlby*.

The act of Congress contemplated not only the reservation of the uplands of "that body of lands known as Annette Islands," but also of the adjacent waters and, fairly construed, was such a reservation.

In any event the President's proclamation of April 28, 1916, was an effective exercise of the power of the United States to reserve such adjacent waters.

The proclamation was within the authorization of § 465, Rev. Stats.

The fish-trap, erected without license, was a purpresture and the appellant a mere trespasser. *Webber* v. *Harbor Commissioners*, 18 Wall. 57; *Russian-American Co.* v. *United States*, 199 U. S. 570.

The trap was erected in violation of the Rivers and Harbors Act of 1899.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by the United States to enjoin the Alaska Pacific Fisheries, a California corporation, from maintaining, and to compel it to remove, an extensive fish-trap erected by it in navigable waters at the Annette Islands in Alaska. The objections urged against the trap are, first, that it is within a reservation lawfully established for the use of the Metlakahtla and other Indians, and, second, that it is an unauthorized obstruction to the navigable capacity of waters of the United States. A decree was entered granting the relief sought, and this was affirmed by the Circuit Court of Appeals. 240 Fed. Rep. 274.

The Annette Islands are a group of small islands in southeastern Alaska. During the summer of 1887 some 800 Metlakahtla Indians emigrated from British Columbia and settled on one of these islands. The emigration and settlement were not only acquiesced in but encouraged by executive and administrative officers of the United States,[1] and subsequently were sanctioned by Congress through the enactment of § 15 of the Act of March 3, 1891, c. 561, 26 Stat. 1101. That section reads as follows:

"That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such

[1] House Ex. Docs., 50th Cong., 1st sess., vol. 10, p. 64, vol. 13, p. 34; Sen. Mis. Doc., No. 144, 53d Cong., 2d sess.; Sen. Doc., No. 275, 55th Cong., 2d sess.

other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior."

The fish-trap was erected in 1916 without the consent of the Indians or the Secretary of the Interior. It is a formidable structure consisting of heavy piling and wire webbing, is located in water of considerable depth, approximately 600 feet from the high tide line of the island on which the Indians settled, is intended to catch about 600,000 salmon in a single season, and its operation will tend materially to reduce the natural supply of fish accessible to the Indians.

The principal question for decision is whether the reservation created by the Act of 1891 embraces only the upland of the islands or includes as well the adjacent waters and submerged land. The question is one of construction—of determining what Congress intended by the words "the body of lands known as Annette Islands."

As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank* v. *County of Yankton*, 101 U. S. 129, 133; *Shively* v. *Bowlby*, 152

U. S. 1, 47–48, 58; *United States* v. *Winans*, 198 U. S. 371, 383. The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States. See *United States* v. *Kagama*, 118 U. S. 375, 379, *et seq.*; *United States* v. *Rickert*, 188 U. S. 432, 437.

The islands are in the interior of the Alexander Archipelago and separated from other islands by well known bodies of water. Before the Metlakahtla settlement they were wild and uninhabited. While bearing a fair supply of timber, only a small portion of the upland is arable, more than three-fourths consisting of mountains and rocks. Salmon and other fish in large numbers frequent and pass through the waters adjacent to the shore and the opportunity thus afforded for securing fish for local consumption and for salting, curing, canning and sale gives to the islands a value for settlement and inhabitance which otherwise they would not have.

The purpose of the Metlakahtlans, in going to the islands, was to establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

After their settlement and before the reservation was created, the Indians, under the guidance of a noted missionary, adopted a form of self-government suited to their needs; established for themselves a village with substantial dwellings, schoolhouses and the like, and

constructed and installed an extensive establishment where they canned salmon for the market.[1]

The purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. True, the Metlakahtlans were foreign born, but the action of Congress has made that immaterial here.

The circumstances which we have recited shed much light on what Congress intended by "the body of lands known as Annette Islands." The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland—in other words, as descriptive of the area comprising the islands.

This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Choate* v. *Trapp*, 224 U. S. 665, 675, and cases cited. And it has further support in the facts that, save for the de-

[1] House Ex. Docs., 50th Cong., 2d sess., vol. 10, p. cii; House Mis. Docs., 52d Cong., 1st sess., vol. 50, part 9, pp. 27–29, 188.

fendant's conduct in 1916, the statute from the time of its enactment has been treated, as stated in the opinion of the Alaska court, by the Indians and the public, as reserving the adjacent fishing grounds as well as the upland, and that in regulations prescribed by the Secretary of the Interior on February 9, 1915, the Indians are recognized as the only persons to whom permits may be issued for erecting salmon traps at these islands.

These views are decisive of the suit and sustain the decree below.

*Decree affirmed.*